Supreme Court, U.S.
FILED

113 (1)

No. 08-___08-704 NOV 26 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

TERRELL BOLTON,

Petitioner,

v.

THE CITY OF DALLAS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Blvd.
Houston, TX 77008
(713) 526-5677

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) In an action under 42 U.S.C. § 1983, may a city or other local government body be held liable for a constitutional violation because the official who committed that violation exercised the final authority to make the decision in question?

(2) In an action under 42 U.S.C. § 1983, does the existence of a written government standard forbidding a constitutional violation preclude the imposition of liability on a city or other local government body for such a violation by its officials?

PARTIES

The parties to this proceeding are set forth in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Statute and Charter Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
I. The "Deeply Divided" Decisions of This Court Have Created Conflict and Uncertainty Among The Lower Courts	7
II. There Is A Deeply Entrenched Inter-Circuit Conflict Regarding The Standard for Determining Who Is A "Policymaker" In A Section 1983 Case	12
A. The Majority View: Municipalities Liable for Actions by Officials Exercising Final Decisionmaking Authority	15
B. The Minority View: More Than Final Decisionmaking Authority Required	24
C. The Conflict Is Deeply Entrenched and Well Recognized	28
III. There Is An Inter-Circuit Conflict Regarding The Significance of A Written Standard Forbidding A Constitutional Violation	33

TABLE OF CONTENTS – Continued

Page

A. There Is A Three-Way Division Among The Lower Courts Regarding The Significance of Such A Standard 33

B. The Fifth and Seventh Circuit Standard Is Inconsistent With The Purpose and History of Section 1983 39

Conclusion 41

APPENDIX

Opinion of the Court of Appeals for the Fifth Circuit, August 7, 2008 ..... 1a

Order of the District Court for the Northern District of Texas, August 17, 2007 ..... 15a

Opinion of the Court of Appeals for the Fifth Circuit, December 7, 2006 ..... 30a

Order of the District Court for the Northern District of Texas, September 20, 2005 ..... 39a

Order of the Court of Appeals for the Fifth Circuit Denying Rehearing En Banc, September 9, 2008 ..... 46a

Statute and Charter Provisions Involved 48a

TABLE OF AUTHORITIES

Page

CASES:

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) 17, 18

Angarita v. St. Louis County, 981 F.2d 1537 (8th Cir. 1992) 27, 37

Anthony v. City of New York, 339 F.3d 129 (2d Cir. 2003) 28

Arendale v. City of Memphis, 519 F.3d 587 (6th Cir. 2008) 19

Auriemma v. Rice, 957 F.2d 397 (7th Cir. 1992) ..... *passim*

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) 19, 20

Barrow v. Greenville Ind. Sch. Dist., 480 F.3d 377 (5th Cir. 2007) 38

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) (en banc) 13, 14, 15, 29

Bennett v. City of Slidell, 735 F.3d 861 (5th Cir. 1984) (en banc) 6, 14, 28, 30

Board of County Commissioners of Bryan County v. Brown, 420 U.S. 397 (1997) 10

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc) 29

Brown v. City of Fort Lauderdale, 923 F.2d 1474 (11th Cir. 1991) 23

Burkes v. Klauser, 185 Wis.2d 308, 517 N.W.2d 503 (1994) 30

TABLE OF AUTHORITIES – Continued

Page

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 2, 10

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 8, 9

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) ..... *passim*

Clue v. Johnson, 179 F.3d 57 (2d Cir. 1999) 28

Cordero v. Jesus-Mendez, 867 F.2d 1 (1st Cir. 1989) 16

Crowley v. Prince George's County, Maryland, 890 F.2d 683 (4th Cir. 1989) 26, 27

Davison v. City of Minneapolis, Minnesota, 490 F.3d 648 (8th Cir. 2007) 27

Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989) 21, 22

Gianessi v. City of Pekin, 52 Fed.Appx. 265 (7th Cir. 2002) 25

Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro, 64 F.3d 962 (4th Cir. 1995) 26, 27

Grenetzke v. Kenosha Unified School District No. 1, 274 F.3d 464 (7th Cir. 2001) 26

Gronowski v. Spencer, 424 F.3d 285 (2d Cir. 2005) 16, 28

Harrington v. Almy, 977 F.2d 37 (1st Cir. 1992) 15, 16

Hyland v. Wonder, 117 F.3d 405 (9th Cir. 1997) 20

TABLE OF AUTHORITIES – Continued

Page

Jeffes v. Barnes, 208 F.3d 49 (2d Cir. 2000) 17

Lawshee v. Simpson, 16 F.3d 1475 (7th Cir. 1994) 38

Lucas v. O'Loughlin, 831 F.2d 232 (11th Cir. 1987) 23

Lytle v. Carl, 382 F.3d 978 (9th Cir. 2004) 20, 34, 35

Martinez v. City of Opa-Locka, Florida, 971 F.2d 708 (11th Cir. 1992) 22, 23, 35, 36

McGreevy v. Stroup, 413 F.3d 359 (3d Cir. 2005) 18

McNeese v. Board of Education, 373 U.S. 668 (1963) 40

Monell v. Department of Social Services of City of N.Y., 436 U.S. 658 (1978) ..... *passim*

Monroe v. Pape, 365 U.S. 167 (1961) 39, 40

Mullins v. City of Huntsville, Ala., 785 F.2d 1529 (11th Cir. 1986) 30

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982) 40

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 8, 9, 10, 14, 24

Radic v. Chicago Transit Authority, 73 F.3d 159 (7th Cir. 1996) 38

Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995) 36, 37

Rasche v. Village of Beecher, 336 F.3d 588 (7th Cir. 2003) 25

TABLE OF AUTHORITIES – Continued

Page

Rivera-Torres v. Velez, 341 F.3d 86 (1st Cir. 2003) 16

Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2d Cir. 1983) 17, 28

Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980) 14, 29, 30

Shehee v. City of Wilmington, 67 Fed.Appx. 692 (3d Cir. 2003) 19

Small v. Inhabitants of City of Belfast, 796 F.2d 544 (1st Cir. 1986) 29

Solomon v. Philadelphia Housing Authority, 143 Fed.Appx. 447 (3d Cir. 2005) 17, 18

Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989) 20, 21

Templeton v. Bessemer Water Service, 154 Fed.Appx. 759 (11th Cir. 2005) 23

Town of Orangetown v. Magee, 88 N.Y.2d 41, 665 N.E.2d 1061 (1996) 24

Ware v. Unified School District No. 492, 881 F.2d 906 (10th Cir. 1989) 21

Williams v. Butler, 863 F.3d 1398 (8th Cir. 1988) (en banc) 28

Williams-El v. Johnson, 872 F.2d 224 (8th Cir. 1989) 37

CONSTITUTION:

U.S. Const. amend. XIV 3, 39

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... *passim*

OTHER AUTHORITIES:

1 J. Cook and J. Sobieski, Jr., Civil Rights Actions, par. 2.05[B][4] (2008) 31

J. Ryland, *Constitutional Law – Auriemma v. Rice: The Seventh Circuit's Narrow Construction of § 1983 Municipal Liability*, 24 Mem.St.U.L.Rev. 111 (1993) 32

Peter Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 Geo.L.J. 1753 (1989) 11

S. Cushman, *Municipal Liability Under § 1983: Toward A New Definition of Municipal Policymaker*, 34 B.C.L.Rev. 693 (1993) 11, 31

The Supreme Court, 1987 Term, 102 Harv.L.Rev. 320 (1988) 11

Dallas City Charter, ch. III, § 15 4

Petitioner Terrell Bolton respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 7, 2008.

OPINIONS BELOW

The August 7, 2008 opinion of the court of appeals, which is reported at 541 F.3d 545 (5th Cir. 2008), is set out at pp. 1a-14a of the Appendix. The September 9, 2008, order of the court of appeals denying rehearing en banc, which is not reported, is set out at pp. 46a-47a of the Appendix. The August 17, 2007 decision of the district court, which is unofficially reported at 2007 WL 2381253 (N.D.Tex. 2007), is set out at pp. 15a-29a of the Appendix. The December 7, 2006 opinion of the court of appeals, which is reported at 472 F.3d 261 (5th Cir. 2006), is set out at pp. 30a-38a of the Appendix. The September 20, 2005 decision of the district court, which is unofficially reported at 2005 U.S. Dist. LEXIS 20543 (N.D.Tex. 2005), is set out at pp. 39a-45a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 7, 2008. A timely petition for rehearing en banc was denied on September 9, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CHARTER PROVISIONS INVOLVED

The statute and charter provisions involved are set forth in the Appendix.

STATEMENT OF THE CASE

In *Monell v. Department of Social Services of City of N.Y.*, 436 U.S. 658 (1978), this Court held that a city[1] can be held liable for a constitutional violation by an official "whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. Under *Monell* and its progeny the scope of municipal liability turns on the definition of what constitutes "policy" and who is a "policymaker." This Court's decisions on that issue have been "deeply divided." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385-86 (1989). This case presents two major questions that have divided the lower courts regarding the scope of municipal liability under *Monell*.

From 1999 until 2003 petitioner Bolton, who had risen from within the ranks of the Dallas Police Department, was the Police Chief of Dallas, Texas. In August 2003 the Dallas City Manager fired Bolton.[2]

---

[1] The same standard applies to claims against counties, school boards, and other local government bodies. For simplicity the petition refers to claims against cities.

[2] The city agreed that Bolton had not been fired for cause. (App. 17a, 31a, 40a).

Bolton did not challenge his removal from the position of Chief of Police, but asserted that he was entitled to continued employment as a police officer, and that he therefore should have been demoted to a lower rank within the Department rather than being dismissed. (App. 2a, 16a). Bolton commenced this suit against the city of Dallas and the City Manager, alleging that his dismissal was unconstitutional. Bolton contended that under the Dallas city charter he had a property interest in continued employment as a police officer, and that by dismissing him (rather than demoting him) the city had violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Dallas moved for summary judgement, arguing inter alia that Bolton did not have a constitutionally-protected property interest in continued employment in the Police Department. In September 2005 the district court granted summary judgment on that ground. (App. 41a-44a). In the first appeal in this litigation, the Fifth Circuit overturned that district court decision, holding that the Dallas charter indeed created a constitutionally-protected property interest in further employment. (App. 33a-36a). The Fifth Circuit dismissed the claim against the City Manager, however, holding that he was entitled to qualified immunity. (App. 37a-38a).

On remand Dallas again moved for summary judgment, arguing that under this Court's decisions in *Monell* and its progeny the city itself could not be held liable even though the City Manager himself had

commited the asserted constitutional violation when he dismissed Bolton. The court below acknowledged that the City Manager's action in dismissing Bolton was final because the city charter expressly forbade the Dallas City Council from interfering in any way with the City Manager's absolute authority to fire a department head. The relevant charter provision expressly gives the City Manager sole control over both "removal from ... office" and "removal from ... employment" of any executive rank official such as the Chief of Police. (Dallas City Charter, ch. III, § 15).

The city nonetheless argued that the city was not legally responsible for the action of the City Manager in dismissing Bolton. "Defendants ... contend that if [the City Manager's] decision to terminate Bolton was wrong, it was not the decision of the City, and the City cannot be held liable under section 1983." (App. 23a). The district court sustained that contention and again granted summary judgment in favor of the city. (App. 20a-28a).

The Fifth Circuit affirmed. The court of appeals acknowledged that under the Dallas city charter the City Manager had been given the final authority to decide to fire the Chief of Police as well as certain other high ranking city officials. (App. 2a, 4a, 11a, 12a). The dispositive issue in the litigation below was whether that type of absolute authority falls within what *Monell* and its progeny deemed to be "policy-making" authority.

First, the court of appeals reasoned that whether a city is responsible for the actions of a municipal official turns on whether the official's powers are "legislative" or merely "executive" in nature. Only "legislative" actions, it held, constitute policy under *Monell* and its progeny. (App. 9a, 11a-12a).

> The repeated references [in Texas statutes] to the city manager's responsibility for "administration" make clear that the position is executive rather than legislative; that is, state law . . does not give to city managers "the responsibility for making law or setting policy in any given area of a local government's business." [*City of St. Louis v.*] *Praprotnik*, 485 U.S. [112,] 125 [(1988) (plurality opinion)].

(App. 11a-12a). Although the Dallas city charter gave the city manager "final decisionmaking authority" regarding whether, when, or for what to fire a Chief of Police or any other executive rank official, that delegated authority was not "policymaking authority" because "state and local law show that the city manager is an executive and administrative official." (App. 11a). In the Fifth Circuit's view, dismissal decisions are executive or administrative in nature; thus the delegation of the City Manager of final authority to make that type of decision did not constitute a delegation of "policymaking" authority. (App. 12a).

The Fifth Circuit acknowledged that other cases interpreting "policymaking" authority under *Monell*

draw no such distinction between legislative and executive positions or actions, but instead impose liability for the actions of municipal officials that are final and unreviewable. The panel emphasized, however, that the Fifth Circuit had expressly and repeatedly disapproved the decisions adopting that less restrictive standard.

> [I]n this circuit, " ... 'we *rejected* the line of authority ... which would permit policy ... to be attributed to the city itself by attribution to any and all officers endowed with final power or authority.'" *Jett* [*v. Dallas Independent School District*, 7 F.3d 1241,] 1248 [(5th Cir. 1993)] (quoting *Bennett v. City of Slidell* 735 F.2d 861, 862 (5th Cir. 1984) (en banc))].... The finality of an official's action does not therefore automatically lend it the character of a policy.

(App. 9a-10a) (emphasis added).

Second, the court of appeals reasoned that even if the City Manager were a policymaker with regard to employment decisions, the city still would not have been legally responsible for action of the City Manager in firing Bolton because that dismissal, although it might violate the Constitution, also violated the Dallas city charter.

> Chapter XII, § 5 of the Charter ... prohibits the specific action taken by [the City Manager]. Thus, absent some contrary custom not shown here, [the City Manger's] action clearly does not represent final policy with

> respect to the removal of city officials like Bolton. It is the Charter that announces the City's policy in this regard.

(App. 13a).

Bolton filed a timely petition for rehearing en banc. The petition was denied on September 9, 2008.

REASONS FOR GRANTING THE WRIT

I. THE "DEEPLY DIVIDED" DECISIONS OF THIS COURT HAVE CREATED CONFLICT AND UNCERTAINTY AMONG THE LOWER COURTS

This case presents two major inter-circuit conflicts regarding the standard governing when a city may be held liable in an action under section 1983. Both of those conflicts are rooted in the deeply divided decisions of this Court.

This Court's decision in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), "attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 [Civil Rights A]ct and our prior cases, and ... le[ft] further development of this action to another day." 436 U.S. at 695. *Monell* held that a city is liable for constitutional violations by an official "whose edicts or acts may fairly be said to represent official policy," 436 U.S. at 694, but provided no guidance as to what would

constitute a policy or policymaking. Justice Powell noted that under the Court's opinion – which he joined – "[t]here are substantial line drawing problems," and that "[d]ifficult questions nevertheless remain for another day." 436 U.S. at 713. Thirty years later, the day on which those questions and problems would be resolved has not yet arrived.

This Court quickly recognized the uncertainty generated by *Monell*. Two years after that decision it observed that "the contours of municipal liability under § 1983 ... are currently in a state of evolving definition and uncertainty." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981). In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Court was unable to agree on the standard for distinguishing a policy (or policymaking) from other acts of municipal employees. "[T]he majority splintered into three separate camps on the ultimate theory of municipal liability, and the case generated five opinions in all." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 143 (1988) (Brennan, J., concurring); see *id.* at 123 ("in *Pembaur* ... we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy.... [T]he Court was unable to settle on a general formulation.") (plurality opinion); *Pembaur*, 475 U.S. at 482-83 (plurality opinion), 485-87 (White, J., concurring), 487-90 (Stevens, J., concurring), 490-91 (O'Connor, J., concurring), 492-502 (Powell, J., dissenting).

Two years later, now a full decade after *Monell*, five members of the Court recognized that the

standard governing municipal liability was still "in a state of evolving definition and uncertainty." *Praprotnik*, 485 U.S. at 120 (plurality opinion), 167 (Stevens, J., dissenting) (quoting *Newport*); see 485 U.S. at 125 n.2 (plurality opinion) (municipal liability jurisprudence "a body of law that is already so difficult.").

> The definition of municipal liability manifestly needs clarification, at least in part to give lower courts and litigants a fairer chance to craft jury instructions that will not require scrutiny on appellate review....
>
> The Courts of Appeals have already diverged in their interpretation of [*Pembaur*].... Today, we set out again to clarify the issue that we last addressed in *Pembaur*.

485 U.S. at 121, 124 (plurality opinion). Clarification, however, was not readily to be had. The Court was again unable to agree on a standard. As in *Pembaur*, the divergent opinions proposed three different standards. 485 U.S. at 124-32 (plurality opinion), 132-47 (Brennan, J., concurring), 147-73 (Stevens, J., dissenting).

The plurality opinion criticized the standard in Justice Brennan's concurring opinion as "serv[ing] primarily to foster needless unpredictability in the application of § 1983." 485 U.S. at 131. The plurality objected that the standard proposed by Justice Stevens "is too imprecise to hold much promise of consistent adjudication." 485 U.S. at 125 n.2. Any effort to delineate a clear standard for municipal liability, the

plurality reasoned, was confounded by a "conundrum," conceding that "[i]t may not be possible to draw an elegant line." 485 U.S. at 126-27. The limited "guidance" offered by the plurality was apparently misunderstood by Justice Brennan, who saw in it implications which the plurality responded were not "necessary or correct." 485 U.S. at 130. The plurality suggested that "refinements of [its articulated] principles may be suggested in the future." 485 U.S. at 127.

In the twenty years since *Praprotnik*, no such future refinements have been forthcoming from this Court. Although the Court has dealt with other issues, it has not returned to the fundamental question of what constitutes a policy, and policymaking, under *Monell*. A year after *Praprotnik* a majority of the Court conceded that its previous decisions had been "deeply divided." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385-86 (1989). In 1997 three members of the Court observed that *Monell* "ha[d] generated a body of interpretive law that is so complex that the law has become difficult to apply." *Board of County Commissioners of Bryan County v. Brown*, 420 U.S. 397, 431 (1997) (Breyer, J., dissenting). "It is not surprising that results [in the lower courts] have sometimes proved inconsistent." 420 U.S. at 435 (citing conflicting results in the courts of appeals).

It was readily apparent that the divergent opinions in *Pembaur* and *Praprotnik* would lead to confusion among the lower courts.

> The divided opinion in *Praprotnik* marks the continuing inability of the Court to complete its self-appointed task of defining a set of municipal employees whose isolated acts may lead to municipal liability.... Justice O'Connor's opinion fails to provide clear guidance. First, it failed to define a "policy-maker." ... [L]ike Justice O'Connor's opinion, Justice Brennan's provides less certainty than one might hope.

The Supreme Court, 1987 Term, 102 Harv.L.Rev. 320, 321, 326-27 (1988).

> [*Praprotnik*] only made matters worse.... [T]his pattern of divisive, inconclusive decisions ... lacks the transparency, accessibility, and congruence with its underlying purposes that any legal standard ought possess. Its indeterminacy in turn makes case outcomes seem manipulable, unprincipled, and arbitrary....

Peter Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 Geo.L.J. 1753, 1754-55 (1989).

In the years since *Praprotnik* commentators have tracked the growing confusion and conflicts among the lower courts. "[T]he contrasting views expressed by circuit courts about when policymakers have delegated their policymaking authority and whether certain officials are per se policymakers demonstrate that *Praprotnik* has proven to be an unsuccessful guide." S. Cushman, *Municipal Liability Under*

§ 1983: Toward A New Definition of Municipal Policymaker, 34 B.C.L.Rev. 693, 694 (1993). Lower court judges have repeatedly expressed their frustration with this lack of clarity.

> Decisions of the other courts of appeals on this subject are so varying that there is little point in canvassing them. A series of fractured opinions from the Supreme Court gave comfort to almost every position.

Auriemma v. Rice, 957 F.2d 397, 400 (7th Cir. 1992).

This petition presents the two most important unresolved questions concerning municipal liability under *Monell*. This case is a particularly appropriate vehicle for addressing those questions because, like a majority of the lower court decisions in which those questions have arisen, the underlying dispute in this instance concerns a violation of the constitutional rights of a city employee.

II. THERE IS A DEEPLY ENTRENCHED INTER-CIRCUIT CONFLICT REGARDING THE STANDARD FOR DETERMINING WHO IS A "POLICYMAKER" IN A SECTION 1983 CASE

The most widespread post-*Praprotnik* conflict among the lower courts concerns the standard for identifying the city officials for whose actions the city itself is legally responsible. A majority of the circuits hold that, at least in the employment context, a city is liable for the actions of whichever city official or

agency has the *final* authority – not subject to further review by other city officials – to make the decision in question, e.g. to fire a particular worker. (See pp. 15-24, *infra*). The minority view imposes liability on cities for actions of officials with such final decisionmaking authority only if they also possess certain additional power, such as (in the Fifth Circuit) officials who exercise "legislative power." (See pp. 24-28, *infra*).

This conflict has given rise to a concomitant semantic dispute. That disagreement derives from the portion of the decision in *Monell* which used the (there undefined) term "policy" to characterize the actions for which cities would be liable under section 1983. In the majority circuits an official who exercises final decisionmaking authority is characterized as making "policy" and is referred to as a "policymaker." In the minority circuits, on the other hand, only an official who has the requisite additional power is labeled a final "policymaker"; officials who lack that special power are called mere final "decisionmakers." (See App. 7a). Thus an official such as the City Manager in the instant case would be characterized as a policymaker under the standard in most circuits, but not under the Fifth Circuit's definition of a policymaker.

In the years immediately following *Monell*, the circuit courts that reached this issue initially agreed upon the majority final decisionmaking authority standard. In 1984, however, the Fifth Circuit rejected that standard in a sharply divided en banc decision. *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984)

(en banc). The *Bennett* majority recognized that the Fifth Circuit itself had in the past applied the final authority standard, citing in particular that court's earlier decision in *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980). 728 F.2d at 766. The court noted as well that "[o]ther circuits have followed this rationale," citing decisions in the Second, Ninth and Eleventh Circuits. 728 F.2d at 767. But *Bennett* established for the Fifth Circuit a new more restrictive standard, limiting liability to the final actions of officials who held certain types of power (denoted "policymaking" power). The en banc court in *Bennett* expressly

> rejected the line of authority, discussed in [the portion of the opinion referring to precedents in the Second, Ninth and Eleventh Circuits] and represented in particular by our opinion in *Schneider* ... which would permit policy ... to be attributed to the city itself by attribution to ... [a] city officer endowed with final ... power or authority.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (en banc).

This Court's subsequent decisions in *Pembaur* and *Praprotnik* did not resolve this conflict. To the contrary, as the Seventh Circuit has observed, this Court's decisions, rather than providing clear guidance on this pivotal question, instead "gave comfort to almost every position." *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992). Since *Praprotnik* the Fifth Circuit has reaffirmed its express rejection of the

"line of authority" imposing liability for the decisions of officials with final decisionmaking authority, most recently in the decision in the instant case. (App. 9a-10a). In the last two decades the conflict that originated in *Bennett* has spread and deepened; today this recurring legal issue has been addressed by eleven of the twelve geographical circuits, with widely divergent results.

A. The Majority View: Municipalities Liable for Actions by Officials Exercising Final Decisionmaking Authority

Seven circuits and the highest court of one state hold that a city is liable under *Monell* for the actions of a municipal official whose employment (or other) decisions are final, not subject to review by any other city official or agency.

The First Circuit has repeatedly held that a city is liable if the city official with final decisionmaking authority takes an employment action that violates the Constitution. In *Harrington v. Almy*, 977 F.2d 37 (1st Cir. 1992), an opinion joined by then Judge Breyer, a City Manager fired the plaintiff when he refused to agree to an unconstitutional condition for continued employment.

> [A] single decision can be a policy for *Monell* purposes ... if it is made by the official charged with the final responsibility for making it under local law.... [The City Manager] could be found by a finder of fact to be the decisionmaker possessing final authority

> with respect to employment determinations such as the type of [conditions of employment].

977 F.2d at 45. The First Circuit applied that rule as well in *Cordero v. Jesus-Mendez*, 867 F.2d 1 (1st Cir. 1989), despite the fact that the city lawmakers clearly did not agree with the action in question. In *Cordero* a newly elected mayor fired several dozen city employees because they were members of the other political party, the very party that continued to control the city's Municipal Assembly. 867 F.2d at 4-5. The court of appeals nonetheless held that under *Monell* the city was liable for the mayor's actions because of their finality.

> The Mayor ... is one "whose edicts or acts may fairly be said to represent official policy." Under Puerto Rico law, one of the express powers given to mayors of municipalities is: "To appoint all the officials and employees of the municipal executive branch and remove them from office...."

867 F.2d at 7 (quoting *Monell*). In *Rivera-Torres v. Velez*, 341 F.3d 86 (1st Cir. 2003), the First Circuit explained that because a mayor's action in dismissing city workers was final, the mayor's employment decisions "ipso facto 'constitute the official policy of the municipality.'" 341 F.3d at 103 (quoting *Cordero*).

The Second Circuit also applies this final decisionmaking authority standard. In *Gronowski v. Spencer*, 424 F.3d 285 (2d Cir. 2005), the mayor of Yonkers laid off the plaintiff because she had supported

a political opponent. The city was held liable for that action because the mayor had final authority to hire and fire.

> Where a city official "has final authority over significant matters involving the exercise of discretion," his choices represent official policy.... [The mayor's] actions undoubtedly represent government policy. Because he has final authority over hiring and firing decisions, which are discretionary matters, his decisions in this area constitute the municipality's final actions.

424 F.3d at 296-97 (quoting *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983)). Similarly, when a sheriff led a campaign of retaliation against a corrections officer who had cooperated with the FBI, the Second Circuit held that the county was legally responsible for that action because

> no provision of State or local law ... requires a sheriff to answer to any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence.

Jeffes v. Barnes, 208 F.3d 49, 61 (2d Cir. 2000).

In the Third Circuit an official is a policymaker if he or she "has final, unreviewable discretion to make a decision or take an action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990). The Third Circuit reiterated this standard in *Solomon v. Philadelphia Housing Authority*, 143 Fed.Appx. 447,

456 (3d Cir. 2005), a decision joined by then Judge Alito.[3] In *McGreevy v. Stroup*, 413 F.3d 359 (3d Cir. 2005), the Third Circuit applied that standard to hold a school district liable because a school superintendent had retaliated against the plaintiff by giving her an adverse performance rating.

> [T]he Pennsylvania Code ... makes clear that the superintendent is the final policymaker over ratings determinations. [The Code] provides: ["]rating shall be done by or under the supervision of the superintendent of schools....["] ... This section unambiguously gives the superintendent final policymaking authority with regard to employment ratings.

413 F.3d at 368. Relying on this same standard, the Third Circuit held a city liable for a series of retaliatory actions by the director of a city department.

> A "final policymaker" is not always the chief executive officer.... The test is "which official has final, unreviewable discretion to make a decision or take an action." *Andrews*.... In the present case, the [department head] had the final say regarding the hiring and firing of employees. If [the department head] could have fired [the plaintiff], it simply does not

---

[3] 143 F.Appx. at 456-57 ("if either of th[e] employees [who violated the plaintiff's constitutional rights] had final decision-making authority (i.e., acted as a "policymaker") with regard to [the plaintiff's] suspension, [the Public Housing Authority] can be held liable").

> make sense to argue that he did not have the final policymaking authority to harass him (a lesser retaliatory action).

Shehee v. City of Wilmington, 67 Fed.Appx. 692, 696 (3d Cir. 2003).

In the Sixth Circuit "the hallmark of municipal liability is the *finality* of the decision being reviewed." *Arendale v. City of Memphis*, 519 F.3d 587, 601 (6th Cir. 2008) (emphasis in original). In *Arendale* the plaintiff alleged that his suspension from the city police department was unconstitutional; the Sixth Circuit concluded that the city was liable for that asserted violation because the action of the Police Chief in approving the suspension was unreviewable.

> [The Police Chief] has final decision making power within the Memphis Police Department.... [N]either the Memphis Charter nor the Memphis City Code provide for further review of Plaintiff's suspension. [The Police Chief] had "final policy making authority" with respect to Plaintiff's disciplinary charge. *Praprotnik*, 485 U.S. at 123.... Accordingly ... the City may be held liable under § 1983 for the final disciplinary decision of [the Chief.]

519 F.3d at 602. In *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), the Sixth Circuit applied the same standard in holding a city liable for the action of a Police Chief in demoting the plaintiff. "[B]ecause it is clear that [the Chief] did in fact possess final

authority to demote [the plaintiff], the City can be held liable for his actions." 401 F.3d at 744.

In the Ninth Circuit as well local governments are liable for constitutional violations by officials who possess unreviewable decisionmaking authority. In *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004), the board of trustees of a county school district had accorded final authority over disciplinary actions to the school superintendent and his subordinates. The court of appeals concluded that the school district was liable for retaliatory actions taken by an assistant superintendent. "That [the assistant superintendent's] disciplinary decisions were not subject to review by anyone within the District indicates that he was a final policymaker." 382 F.3d at 985. In *Hyland v. Wonder*, 117 F.3d 405 (9th Cir. 1997), the plaintiff had been dismissed by the Chief Juvenile Probation Officer, an action which was not subject to review by any other city agency or official. 117 F.3d at 414-15. The finality of that employment decision meant that the Juvenile Probation Officer "acted as a final policymaker with regard to [the plaintiff's] position." 117 F.3d at 416.

The Tenth Circuit has repeatedly imposed liability on local governments because an employment action had been taken by an official with final decisionmaking authority. *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), held a county liable for the action of the County Assessor who had fired a subordinate in retaliation for her complaints about sexual harassment, reasoning that "aggrieved staff members

such as plaintiff had no meaningful avenues of review of [the Assessor's] employment decisions." 876 F.2d at 819. In *Ware v. Unified School District No. 492*, 881 F.2d 906 (10th Cir. 1989), the court of appeals held that a school district was liable for the unreviewable act of a school superintendent in dismissing the plaintiff.

> A direct causal link [between the school district and the constitutional violation] ... may be established when the governing body has delegated its decision-making authority to the official whose illegal conduct caused the harm.... Th[e] evidence is clearly sufficient to permit the jury to conclude that the [school] board had effectively delegated its power to terminate [the plaintiff] to [the superintendent]. *Accord Starrett v. Wadley* ... (county liable when it admitted vesting employee with authority to fire his staff).

881 F.2d at 912-13. In *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), the Tenth Circuit applied the final decisionmaking authority doctrine to reprimands issued by a Chief of Police.

> [T]he City admitted that "[a]t all times pertinent hereto, the City ... has delegated to [the Chief of Police] final authority to issue reprimands to Colorado Springs police officers.... This admission effectively disposes of the municipal liability issue because it all but flatly states that [the Chief of Police] was the final policymaker with respect to issuing written reprimands in the department....

> [City ordinances] do not create mandatory or even formal review of department actions.... [F]or all intents and purposes the Chief's discipline decisions are final.... Thus, even if we based our analysis on Colorado Springs' municipal code, we would hold that [the Chief of Police] has final authority to establish policy with respect to departmental reprimands.

890 F.3d at 1568-69.

The Eleventh Circuit has long imposed liability on cities for employment actions of officials with final decisionmaking authority. In *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir. 1992), the court of appeals held the city liable for the action of its city manager in firing the plaintiff. In that case the city charter, in language similar to the city charter in the instant case,[4] gave the city manager final control of the hiring and firing of high level city officials. Such final decisionmaking authority made the city responsible for the actions of the city manager.

---

[4] 971 F.2d at 714:

> Neither the [city] commission nor any of its members shall direct or request the appointment of any person to, or his removal from, office by the city manager ... or in any manner take part in the appointment or removal of officers and employe[e]s in the administrative service....

> [T]he City's charter eliminates the authority of *any* official or body to review the City Manager's decision to fire an unclassified employee for retaliatory reasons.... [T]he City's charter ... vest[s] the City Manager with absolute, discretionary authority to hire and fire unclassified personnel in the administrative department. On this basis we conclude that [the charter] is a direct grant of power to the City Manager to make final policy with respect to personnel matters for unclassified employees....

971 F.2d at 714-15 (emphasis in original). The decision expressly rejected the argument of a dissenting judge that it should distinguish – as does the Fifth Circuit – between final decisionmaking authority and final policymaking authority. See 971 F.2d at 715-16 (Johnson, J., concurring in part and dissenting in part). The Eleventh Circuit has repeatedly imposed liability on cities for the employment actions of final decisionmakers.[5]

---

[5] E.g., *Templeton v. Bessemer Water Service*, 154 Fed.Appx. 759, 765 (11th Cir. 2005) ("We view the code sections as establishing the mayor as the final decisionmaker regarding a broad range of hiring decisions within the city.... This is precisely the kind of control ... that would subject the city to § 1983 liability."); *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1480 (11th Cir. 1991) (city liable "if state law assigns to [discriminatory official] the final authority to make personnel decisions for the police department"; liability turns on who is "the ultimate decisionmaker"); *Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987) (county liable for actions of official because "he had absolute

(Continued on following page)

The New York Court of Appeals holds that a law which gives an executive official unreviewable authority over a particular type of decision constitutes a delegation of final policymaking authority. In *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 665 N.E.2d 1061 (1996), the Court of Appeals held Orangetown liable for the decision of the town building inspector to revoke a building permit. Under *Praprotnik* and *Pembaur*, it reasoned, the controlling question was "[w]hether an official has final authority to take municipal action in a given case." 88 N.Y.2d at 51, 665 N.E.2d 1067.

> [T]he Building Inspector ... [was] vested by law with the exclusive and unfettered authority to decide the question of revocation....
>
> The town Zoning Code, which necessarily reflects Town policy, vests the Building Inspector, alone, with the authority to revoke building permits.... The Building Inspector therefore implements Town policy....

88 N.Y.2d at 52-53, 665 N.E.2d at 1068.

B. The Minority View: More Than Final Decisionmaking Authority Required

Four circuits, including in this instance the Fifth Circuit, hold that an exercise of final decisionmaking

---

authority over the appointment and control of his [subordinates].")

power, while necessary for municipal liability, is not by itself sufficient. These circuits apply divergent standards regarding what additional circumstance must be present.

In the Seventh Circuit a city is liable only for the acts of officials who hold "legislative" power. The decisions in that circuit

> equate[ ] "policy" with the legislative power of a jurisdiction. The holder of the ultimate power to establish rules of general applicability is the "policymaker." Usually this means the city council; at all events, holders of purely executive power are never "policymakers."

Auriemma v. Rice, 957 F.2d 397, 399 (7th Cir. 1992). *Auriemma* held that the city of Chicago was not responsible for the politically motivated demotions of the plaintiffs, even though the demotions had been expressly approved by the mayor himself, because "the mayor is an executive, not legislative, official in Chicago's system of government." 957 F.2d at 400.

The Seventh Circuit has repeatedly insisted that "[g]enerally, a person holding only executive power does not have policymaking authority for purposes of § 1983." *Rasche v. Village of Beecher*, 336 F.3d 588, 601 (7th Cir. 2003) (village not liable for constitutional violation by village president); see *Gianessi v. City of Pekin*, 52 Fed.Appx. 265, 269 (7th Cir. 2002) (city not liable for constitutional violation by mayor

because he was only responsible for "the administration – that is, the *enforcement* – of the laws, an executive function") (emphasis in original); *Grenetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464, 468 (7th Cir. 2001) (where "[a]n executive official ... implements legislative policy ... his act is ... not the act of the municipality itself for purposes of liability under section 1983"; school district not liable for constitutional violation by school superintendent).

The Fifth Circuit decision in the instant case expressly adopts the Seventh Circuit's distinction between legislative and executive authority, holding that only officials with legislative power are the "policymakers" for whom a city is legally responsible. (App. 9a-12a). Applying that narrow definition of municipal liability, the court below concluded that only the Dallas City Council, and not the city's City Manager, makes "policy" under *Monell* and its progeny. (App. 11a-12a).

The Fourth Circuit also distinguishes "the authority to make final *policy* [from] the authority to make final implementing *decisions*." *Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 965-66 (4th Cir. 1995) (emphasis in original). But, unlike the Fifth and Seventh Circuits, the Fourth Circuit holds that executive actions do at times constitute the type of conduct for which a city can be held liable. In the Fourth Circuit an executive official is a policymaker if he or she can establish "rules, plans, [or] procedures." *Greensboro*, 64 F.3d at 965; see *Crowley v. Prince George's County,*

Maryland, 890 F.2d 683, 686 (4th Cir. 1989) (city agency a policymaker because it was authorized to "proscribe rules.") In *Greensboro* that circuit held that a city manager was a policymaker with regard to employer-employee relations because he was authorized to establish such rules or plans to "administer" the city's personnel programs and to "implement the provisions of [city ordinances]" and to "carry out the intent of the [city] council." 64 F.3d at 965 (emphasis omitted). In *Crowley* the Fourth Circuit held that a County Executive was a policymaker regarding employee relations because the county charter authorized him to "administer[ ]" the county's personnel system. See 890 F.2d at 686 (policymaking includes "final authority to interpret and enforce the city's policy"). The authority of executive officials to "administer" municipal laws and programs is precisely the type of power which the Fifth Circuit in the instant case held is *not* sufficient to warrant municipal liability. (App. 11a).

The Eighth Circuit distinguishes "final policymaking authority from final decisionmaking authority." *Davison v. City of Minneapolis, Minnesota*, 490 F.3d 648, 660 (8th Cir. 2007). In the Eighth Circuit there are two circumstances in which a final decisionmaker is deemed a municipal policymaker. First, as in the Fourth Circuit, an executive official is a policymaker if he or she has the authority to promulgate rules. Thus in *Angarita v. St. Louis County*, 981 F.2d 1537, 1547 (8th Cir. 1992), the Eighth Circuit held that a Superintendent of Police was a policymaker

because he "was responsible for drafting and approving many of the department's general orders." Second, an official is a policymaker if higher officials have wholly relinquished control over his or her actions. Thus in *Williams v. Butler*, 863 F.3d 1398 (8th Cir. 1988) (en banc), the city had "exempt[ed] municipal court employees from the City's general policy statements." 863 F.2d at 1402-03. Because the municipal judge thus had "*carte blanche* authority" over court employees, the judge "was the official policymaker for the hiring and firing of his staff." 863 F.3d at 1403.

C. The Conflict Is Deeply Entrenched and Well Recognized

The conflict regarding this question is deeply entrenched and widely recognized.

The 1984 Fifth Circuit decision in *Bennett* expressly "rejected" the less stringent standard in several other circuits, citing among the disapproved line of cases the Second Circuit decision in *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983). 728 F.2d at 767. Current Second Circuit decisions continue to rely on *Rookard* in imposing liability on a city for the actions of a final decisionmaker.[6]

---

[6] E.g., *Gronowski v. Spencer*, 424 F.3d 285, 296 (2d Cir. 2005) (quoting *Rookard*); *Anthony v. City of New York*, 339 F.3d 129, 139 (2d Cir. 2003) (quoting *Rookard*); *Clue v. Johnson*, 179 F.3d 57, 62 (2d Cir. 1999) (quoting *Rookard*).

Two years after *Bennett*, in *Small v. Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986) the First Circuit noted that the Fifth Circuit's en banc decision in *Bennett* had rejected the majority rule that a city is liable for the final, unreviewable employment action of a city official. 796 F.2d at 552-53. The First Circuit, however, expressly refused to follow the decision in *Bennett*, holding that the majority rule was "more persuasive." 796 F.2d at 553.

In 1981, after the Fifth Circuit decision in *Schneider* (which had adopted the majority rule) but before the en banc decision in *Bennett* (which overturned *Schneider*), the current Eleventh Circuit was established, encompassing several states that had until then been part of the Fifth Circuit. The new Eleventh Circuit expressly adopted as binding precedent all decisions issued by the old Fifth Circuit prior to October 1, 1981,[7] a rule which encompassed the decision in *Schneider*. In 1984 the new Fifth Circuit in *Bennett* repudiated *Schneider* and adopted the minority rule. In 1986, however, the Eleventh Circuit expressly rejected the Fifth Circuit decision in *Bennett*, deciding instead to continue to adhere to *Schneider*.

> The new Fifth Circuit, sitting *en banc*, has rejected this line of authority primarily represented by *Schneider* to the extent that

---

[7] *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

> such cases "would permit policy ... to be attributed to the city itself by attribution to any and all city officials endowed with final ... power or authority." *Bennett*.... The ... Eleventh Circuit ... case law ..., however, emphasizes finality in and of itself is indicative of policymaking ability, and *Schneider* and its progeny are unquestionably still viable authority in this circuit.... "[W]here a government entity delegates the final authority to make decisions then those decisions necessarily represent official policy."

Mullins v. City of Huntsville, Ala., 785 F.2d 1529, 1533 n.2 (11th Cir. 1986) (quoting *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 705 n.9 (11th Cir. 1985)).

The Seventh Circuit commented in *Auriemma* that "decisions of the other courts of appeals on this subject are so varying that there is little point in canvassing them." 957 F.2d at 400. The Supreme Court of Wisconsin observed that

> [t]he federal cases have taken several approaches to this issue. Some cases equate policymaking with legislative power, others with executive power.

Burkes v. Klauser, 185 Wis.2d 308, 353, 517 N.W.2d 503, 522 (1994).

Commentators have repeatedly described this inter-circuit conflict.

> The ... more frequently litigated ... question in determining if an official is a municipal policymaker is whether the official possesses policymaking authority. Two contrasting approaches can be taken in answering this question, and each has found support in the lower courts.
>
> One approach equates a municipality's policymakers with those who exercise its ultimate legislative power.... The opposing approach includes within the definition of municipal policymakers those who are the final authority or ultimate repository of city power, that is, those who exercise or are exercising only executive power. "A person authorized to commit the city to a course of action necessarily sets its policy; on this view, the action *is* the policy."

1 J. Cook and J. Sobieski, Jr., Civil Rights Actions, par. 2.05[B][4] at 2-186 (2008) (footnotes omitted; emphasis in original; quoting *Auriemma*, 957 F.2d at 399).

> Lower courts have taken opposing positions on whether municipal officials not designated by state or local law as policymakers may nonetheless be transformed into policymakers by virtue of the fact that the municipality has vested unreviewable authority to act in those officials.

S. Cushman, *Municipal Liability Under § 1983: Toward A New Definition of Municipal Policymaker*,

34 B.C.L.Rev. 693, 696, 713-14 (1993) (footnotes omitted).

> [There are] two polar approaches to determining who is a municipal policy maker. One approach equates policy-making authority with the legislative power. Under this view, ... a holder of purely executive power, even if his decisions are final, cannot be a policy maker. The other approach equates policy-making authority with the ability "to take final action in the name of the jurisdiction – that is, executive power."

J. Ryland, *Constitutional Law – Auriemma v. Rice: The Seventh Circuit's Narrow Construction of § 1983 Municipal Liability*, 24 Mem.St.U.L.Rev. 111, 118-20 (1993) (footnotes omitted).

This question has now been addressed by eleven circuits, and the issues which it raises have been fully aired in the lower courts. The conflict is deeply entrenched, with several circuits having expressly recognized and disapproved the differing standards in other circuits. The disagreement regarding the relevant standard is manifestly outcome determinative; action by a municipality's city manager is a paradigm of the type of final decisionmaking authority which would provide a basis for municipal liability in most circuits other than the Fifth Circuit. This question is of obvious and recurring importance, and is ripe for review by this Court.

III. THERE IS AN INTER-CIRCUIT CONFLICT REGARDING THE SIGNIFICANCE OF A WRITTEN STANDARD FORBIDDING A CONSTITUTIONAL VIOLATION

A. There Is A Three-Way Division Among The Lower Courts Regarding The Significance of Such A Standard

The divergent opinions in *Praprotnik* triggered another conflict among the lower courts. In the wake of *Praprotnik*, the courts of appeals are divided regarding whether a city is insulated from liability by the existence of a written standard forbidding violations of federal constitutional rights.

Praprotnik addressed this issue in a particularly inconclusive manner. The plurality initially asserted that

> [w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality.

485 U.S. at 926 (plurality opinion). Justice Brennan objected to the implications of this portion of the plurality opinion.

> While I have no quarrel with such a proposition in the abstract, I cannot accept the plurality's apparent view that a municipal charter's precatory admonition against discrimination or any other employment practice not based on merit and fitness effectively

> insulates the municipality from any liability based on acts inconsistent with that policy.... [T]he relevant inquiry is whether the policy in question is actually and effectively enforced through the city's review mechanisms.

485 U.S. at 145 n.7. The plurality, in response, denied that it would attach conclusive significance to "a municipal charter's precatory admonition." 485 U.S. at 130.

> Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced. If such a showing were made, we would be confronted with a different case than the one we decide today.

485 U.S. at 131.

In the wake of these opinions, the lower courts have reached conflicting conclusions regarding cases in which the authoritative action of a city's officials is inconsistent with some written standard. In the Ninth and Eleventh Circuits the existence of such a written standard is of limited or no relevance to whether a city is liable for a constitutional violation. On the other hand, in the Fifth and Seventh Circuits such a written standard generally precludes the imposition of liability on a city. The Eighth and Tenth Circuits have taken an intermediate position.

In *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004), the Ninth Circuit concluded that *Praprotnik* does not permit a government body to insulate itself from

liability simply by adopting a standard prohibiting constitutional violations. In that case a school district had authorized the school superintendent to discipline employees "in accordance with the applicable ... laws." 382 F.3d at 984. The school district argued that

> if a superintendent is instructed in general terms to follow the law, and if that superintendent then violates the law, he or she would be exceeding his delegated authority and would therefore not be a "final policymaker."

382 F.3d at 985. The court of appeals rejected that proposed defense.

> This argument proves too much, for the very premise of school district liability for the acts of a final policymaker is that the policymaker violated the constitutional rights of the plaintiff. A general statement by a school board or board of trustees that a superintendent is not authorized to violate the law, without more, cannot be enough to insulate the school district from liability.

Id.

In *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir. 1992), the Eleventh Circuit took a similar approach. The plaintiff in *Martinez* had been fired by the city manager in retaliation for constitutionally protected activity. The city suggested that the actions of the city manager could not constitute city policy because the city charter required that personnel decisions "be made according to merit and

fitness." 971 F.2d at 714. The Eleventh Circuit rejected that suggestion, emphasizing that the actions of the city manager – whether or not they complied with that provision of the city charter – could not be reviewed by any other city official. 971 F.2d at 714-15. The court of appeals concluded that the plurality opinion in *Praprotnik* barred reliance on a city charter provision which no higher city official could require the city manager to obey.

> The Court ... warned in *Praprotnik* that a municipal charter could not insulate the municipality from liability for constitutional deprivations merely by including a "precatory admonition against discrimination or any other employment practice not based on merit and fitness...." [485 U.S.] at 130.

971 F.2d at 714.[8]

In *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the Tenth Circuit emphasized that "any ... constraints must be *meaningful* – as opposed to merely hypothetical – in order to strip an official of 'final policymaking' authority." 69 F.3d at 450 (emphasis in original). A "[city] charter provision that all personnel decisions were to be made solely based upon 'merit and fitness' did not immunize City from

---

[8] The quotation is from the plurality opinion in *Praprotnik*, which in turn is quoting Justice Brennan's concurring opinion. See 485 U.S. at 935 n.7 (Brennan, J., concurring).

liability based upon City Manager's personnel decision." *Id.*

In *Williams-El v. Johnson*, 872 F.2d 224 (8th Cir. 1989), the Eighth Circuit held that "[t]he written, official policy of a city is to be given great weight in determining what the city's policies are." 872 F.2d at 230. Such a written policy however, is not conclusive in that circuit. In *Angarita v. St. Louis County*, 981 F.2d 1537, 1547 (8th Cir. 1992), the Eighth Circuit upheld the imposition of liability against a county because of the actions of the county Superintendent of Police, stressing that "[t]here is ample evidence that the County departed from its complaint review procedure ... through blatant misconduct and coercion." The court of appeals regarded the violation of the county's own standards as an aggravating factor, not some sort of defense.

In the Seventh Circuit, on the other hand, the existence of a written standard precluding a particular type of constitutional violation does insulate a city from liability for such a violation. In *Auriemma v. Rice*, 957 F.2d 397 (7th Cir. 1992), several Chicago city employees had been demoted shortly after the election of a new mayor; they asserted that the demotions had been ordered by the Chief of Police, with the concurrence of the mayor, because of the political views of the plaintiffs. The court of appeals acknowledged that such patronage practices were widespread and longstanding in the city of Chicago. 957 F.2d at 399. It held, nonetheless, that the city was not liable for those actions.

> Ordinances applicable to the police department unequivocally ban ... political discrimination.... If ... [the Chief] discriminated on account of ... politics, he violated rather than implemented the policy of Chicago.

957 F.2d at 399-401. The Seventh Circuit has held that a city is immune from liability for injuries caused by an unconstitutional conduct of city officials – no matter their rank or position – if the action in question was inconsistent with a state law,[9] a personnel manual,[10] or a consent decree.[11]

In the instant case the Fifth Circuit, as it had earlier,[12] applied the rule in *Auriemma*. The mere existence of a provision of the city charter forbidding the dismissal of Bolton was held to insulate the city from liability. (App. 13a). In so holding, the court of appeals did not suggest that there was any official or agency in the city of Dallas which had the power to prevent or correct such a violation of the city charter by the City Manager. To the contrary, as the Fifth Circuit repeatedly acknowledged, the City Manager's

---

[9] *Radic v. Chicago Transit Authority*, 73 F.3d 159, 161 (7th Cir. 1996).

[10] *Lawshee v. Simpson*, 16 F.3d 1475, 1484 (7th Cir. 1994).

[11] *Auriemma*, 957 F.2d at 399 (citing the consent decree in *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315, 1356-59 (N.D.Ill. 1979)).

[12] *Barrow v. Greenville Ind. Sch. Dist.*, 480 F.3d 377, 382 (5th Cir. 2007).

actions – whether or not they violated the city charter or the constitution – were final.

B. The Fifth and Seventh Circuit Standard Is Inconsistent With The Purpose and History of Section 1983

The courts below sustained the defendant's contention that the City Manager's decision to fire petitioner Bolton, because it violated the city charter, "was not the decision of the City." (App. 23a). That conclusion starkly illustrates how far the caselaw in the Fifth and Seventh Circuits has departed from the intended purpose of section 1983 and from the decisions of this Court.

Nearly half a century ago this Court rejected an all too similar argument, that constitutional violations by city officials are not actions "under color of law" within the meaning of section 1983 if *state* law forbids the constitutional violation in question. *Monroe v. Pape*, 365 U.S. 167, 171 (1961). In disapproving such a limitation on section 1983, this Court emphasized that

> [it] is abundantly clear that one reason [section 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to enjoyment of rights ... guaranteed by the Fourteenth Amendment might be denied by the state agencies.

365 U.S. at 180. In later decisions holding that section 1983 plaintiffs are not required to exhaust state law remedies, this Court twice insisted that relief under section 1983 cannot be denied because the conduct complained of not only violated the federal constitution but was prohibited by state law as well.

> It is immaterial whether respondents' conduct is legal or illegal as a matter of state law.... Such claims are entitled to be adjudicated in the federal courts.

McNeese v. Board of Education, 373 U.S. 668, 674 (1963).

> A major factor motivating [the adoption of section 1983] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals....

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 506 (1982). Nothing in the reasoning of or the legislative history recounted in *Monell* suggests that the existence of such a state law (or city charter) prohibition, which this Court has repeatedly held irrelevant to the meaning of section 1983, should nonetheless be dispositive of and fatal to a section 1983 claim against a city.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Blvd.
Houston, TX 77008
(713) 526-5677

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record*

Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10999

TERRELL BOLTON

Plaintiff-Appellant

v.

CITY OF DALLAS TEXAS; CITY MANAGER TEODORO BENAVIDES, In His Official Capacity

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
(04-CV-501)

(Filed Aug. 7, 2008)

Before JOLLY, CLEMENT and OWEN, Circuit Judges.

PER CURIAM:

After a remand from this court, Terrell Bolton, former police chief of the City of Dallas, Texas, again appeals from the district court's ruling and judgment that the City of Dallas is not liable, under 42 U.S.C. § 1983, for his termination by Ted Benavides, the Dallas city manager. Because we agree that, even though Benavides was the final decisionmaker, his actions in this respect were not the policy of the City and, as a result, the City is not liable for his termination of Bolton, we AFFIRM. We also DENY the respective motions of the parties as moot.

I.

In August 2003, Terrell Bolton was terminated as the Chief of Police of Dallas by Ted Benavides. Bolton filed a 42 U.S.C. § 1983 suit against both Benavides and the City of Dallas, alleging that his due process rights under the Fourteenth Amendment to the United States Constitution had been violated by the termination. Bolton admitted that Benavides had the authority to remove Bolton from his position as Chief of Police but argued that Benavides did not have the authority to terminate him from the police department. Bolton relied on Chapter XII, § 5, of the Dallas City Charter ("the Charter"):

> If the chief of the police department . . . was selected to that position from the ranks of the police department and is removed from the position on account of unfitness for the discharge of the duties of the position, and not for any cause justifying dismissal from

> the service, the chief . . . shall be restored to the rank and grade held prior to appointment to the position, or reduced to a lower appointive rank.

Bolton initially lost his suit in district court on summary judgment; the district court found that Bolton, as Chief of Police, had no property interest in further employment by the City and therefore could not prevail on a due process claim.

A panel of this court disagreed and held that the Charter did give Bolton a property interest "in continued employment at the rank and grade held before his appointment to the executive position." *Bolton v. City of Dallas,* 472 F.3d 261, 264 (5th Cir. 2006). The panel also concluded, however, that Benavides was entitled to qualified immunity in his individual capacity because the precedent governing the case, *Muncy v. City of Dallas,* 335 F.3d 394 (5th Cir. 2003), did not clearly proscribe Benavides's termination of Bolton. *Bolton,* 472 F.3d at 266. The panel therefore dismissed Bolton's claims against Benavides in his individual capacity and remanded the case for determination of further liability, if any. *Id.*

II.

Back in the district court, Benavides and the City once again moved for summary judgment. The district court granted the motion. The district court held that the only remaining claim against Benavides was in his official capacity, and therefore Bolton's suit

contested only the liability of the City. It further held that the City of Dallas could not be held responsible for Benavides's actions because Benavides had frustrated the policy of the City by terminating Bolton in violation of Chapter XII, § 5, of the Charter. Bolton filed a motion for reconsideration that included several arguments not initially raised before the district court. The judge denied this motion. Bolton appealed both the grant of summary judgment in favor of Dallas and the denial of his motion for reconsideration.

III.

On appeal, Bolton argues that the discretion that Benavides had to terminate personnel makes him a policymaker for the City with respect to the employment action here. Accordingly, the City is liable for Benavides's termination of Bolton. Dallas responds that, although Benavides did have discretion to make employment decisions without the direct oversight of the city council, the policies of the City are reflected in the Charter; acts contrary to the Charter cannot be imputed to the City.[1]

---

[1] As we noted above, Bolton also appealed from the district court's denial of his motion for reconsideration. The district court refused to consider new evidence and arguments that Bolton presented in that motion and accordingly denied it. Bolton has included some of that evidence in his brief, prompting Dallas to file a motion to strike those portions of Bolton's brief. Bolton does not, however, make any attempt in his brief to

(Continued on following page)

IV.

A.

We review the district court's grant of summary judgment *de novo*. *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." FED. R. CIV. P. 56(c). "On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Coury v. Moss*, 529 F.3d 579, 584 (5th Cir. 2008).

---

argue that the district court made an error in the denial of the motion for reconsideration. Instead, Bolton addresses the motion for reconsideration only in his response to the City's motion to strike. "We deem abandoned those issues not raised in an appellant's initial brief and we will not consider those issues not raised in the trial court." *United States v. Ragsdale*, 426 F.3d 765, 785 n.9 (5th Cir. 2005). Moreover, the district court plainly acted within its discretion in refusing to consider the new evidence – Bolton's argument that the district court's summary judgment was *sua sponte* and that he therefore had no notice that the evidence was relevant is contradicted by the record. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). In any case, we DENY the City's motion to strike – and Bolton's motion for leave to file a sur-reply – as moot.

B.

Municipal liability for civil rights violations under § 1983 is based on causation rather than *respondeat superior*. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978). The fact that a tortfeasor is an employee or an agent of a municipality is therefore not sufficient for city liability to attach; the municipality must cause the constitutional tort, which occurs "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694.

Bolton does not argue that the City has a written policy or unwritten custom that has caused him constitutional harm. Instead, he argues that the single decision and act of Benavides in terminating him constitutes the policy of the City. It is well-established that a single unconstitutional action by a municipal actor may give rise to municipal liability if that actor is a final policymaker. *Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005). Accordingly, this "court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" *McMillian v. Monroe County*, 520 U.S. 781, 784-85 (1997) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). This inquiry is specific to the particular action at issue, *see id.* at 785, and depends

on an analysis of relevant state and local law, *see Jett*, 491 U.S. at 737.[2]

Our analysis must also take into account the difference between final decisionmaking authority and final policymaking authority, a distinction that this circuit recognized as fundamental in *Jett v. Dallas Independent School District*, 7 F.3d 1241, 1247 (5th Cir. 1993). The distinction between final decisionmaker and final policymaker has its origin in two Supreme Court plurality opinions, *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Both opinions concluded that discretion to exercise a particular function does not necessarily entail final policymaking authority over that function.[3] *Pembaur*,

---

[2] "[C]ustom or usage having the force of law" may also be consulted, *Jett*, 491 U.S. at 737 (internal quotation marks omitted), but Bolton does not base his arguments on these sources.

[3] In a footnote, the *Pembaur* Court illustrated this distinction:

> [F]or example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board

(Continued on following page)

475 U.S. at 483-84, 106 S.Ct. 1292; *Praprotnik,* 485 U.S. at 130. In *Jett,* we understood the decisionmaking addressed in *Pembaur* and *Praprotnik* to include decisions that were "final." 7 F.3d at 1247. We noted that neither of the Supreme Court cases made a "suggestion of any qualification such as 'initial' discretion or the decisionmaker's action being subject to appeal or the like." *Id.* at 1247-48. And, moreover, *Praprotnik* states that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Praprotnik,* 485 U.S. at 127. We held that this statement " applies even to individual decisions which are not reviewable." *Jett,* 7 F.3d at 1248. Thus, *Jett* "eschews the importance of administrative reviewability in distinguishing final decisionmaking authority from final policymaking authority." *Gelin v. Hous. Auth. of New Orleans,* 456 F.3d 525, 530 (5th Cir. 2006).

> left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

475 U.S. at 483 n.12. And, as we noted in *Jett,* 7 F.3d at 1247, this example was revisited in *Praprotnik* as a basis for its distinction between a final policymaker and a final decisionmaker. 485 U.S. at 129-30.

In *Jett,* we also recognized support for this position in a Seventh Circuit case, *Auriemma v. Rice,* 957 F.2d 397 (7th Cir. 1992), and in this circuit's own precedents. *See Jett,* 7 F.3d at 1248. In *Auriemma,* the Seventh Circuit assumed that the Chicago Superintendent of Police had final, executive authority to demote police officers. *Auriemma,* 957 F.2d at 399. But it nevertheless held that such authority could not support municipal liability:

> If it were enough to point to the agent whose act was the final one in a particular case, we would have vicarious liability. Action in the course of one's duty is the basis of vicarious liability. That a particular agent is the apex of a bureaucracy makes the decision "final" but does not forge a link between "finality" and "policy".

Id. at 400. And in this circuit, "[w]e took essentially the same approach . . . where 'we rejected the line of authority . . . which would permit policy or custom to be attributed to the city itself by attribution to any and all officers endowed with final or supervisory power or authority.'" *Jett,* 7 F.3d at 1248 (quoting *Bennett v. City of Slidell,* 735 F.2d 861, 862 (5th Cir. 1984) (en banc) (per curiam)) (second alteration in original). The finality of an official's action does not therefore automatically lend it the character of a

policy.[4] *See id.* at 1246; *Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377, 382 n.17 (5th Cir. 2007).

---

[4] *Gelin* does note that "we have found the existence of effective administrative review to be relevant in certain contexts." 456 F.3d at 530. The cases cited by *Gelin* generally confirm that review procedures can be relevant to showing that an official is *not* a final policymaker. *See, e.g., Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 603 (5th Cir. 2001) (holding that a superintendent was not a final policymaker because her decision was subject to review by the school board); *Worsham v. City of Pasadena*, 881 F.2d 1336, 1341 (5th Cir. 1989) ("The existence of effective review procedures prevents the employees from wielding final responsibility in the instant case."). Further, we have since explicitly understood *Beattie* to otherwise follow *Jett*. *See Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377, 382 n.17 ("This court in [*Beattie*] characterized *Jett* as holding that 'a superintendent's transfer of a teacher to another position might be a final policy decision if that action was unreviewable, even if the superintendent did not have complete control over the hiring and firing of district personnel.' 'Might be' does not mean 'is,' and a person is not a policymaker when he makes a decision simply because that decision is unreviewable."(quoting *Beattie*, 254 F.3d at 603)).

Gelin also cites, and Bolton relies on, *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), one of a number of cases in which we addressed the liability of a Texas county for the actions of its sheriff. But *Brady*, and another case in this line cited by Bolton, *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996), depend on a premise not present here: the special place accorded by state statute to Texas sheriffs as the ultimate repository of legal authority in a given county "not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected." *Turner v. Upton County*, 915 F.2d 133, 136 (5th Cir. 1990); *see also Brady*, 145 F.3d at 699-701; *Bennett*, 74 F.3d at 586. Thus, Texas sheriffs are policymakers as a direct result of state statute; their constitutional violations result in county liability even if contrary to other state

(Continued on following page)

Here, where Dallas has a city council and a city manager, the state and local law show that the city manager is an executive and administrative official with final decisionmaking authority in certain employment decisions; it does not show that the Charter or the city council delegated policymaking power to the city manager. Nor can Bolton otherwise build a case that Benavides had such power in this instance. Bolton first cites state law:

> (a) The city manager shall administer the municipal business and the governing body of the municipality shall ensure that the administration is efficient.
>
> (b) The governing body by ordinance may delegate to the city manager any additional powers or duties the governing body considers proper for the efficient administration of municipal affairs.
>
> (c) The city manager must execute a bond. The bond must be conditioned that the manager will faithfully perform the duties of manager and must be in an amount prescribed by ordinance.

TEXAS LOCAL GOV'T CODE ANN. § 25.029. The repeated references to the city manager's responsibility for "administration" make clear that the position is executive rather than legislative; that is, state law

---

law or policy. *Bennett*, 74 F.3d at 586. No such statute is present here.

alone does not give to city managers "the responsibility for making law or setting policy in any given area of a local government's business." *Praprotnik,* 485 U.S. at 125. State law instead reserves that role for the "governing body."

Nor does the local law that Bolton cites delegate to Dallas's city manager policymaking authority with respect to the employment decision here. The Charter does give a broad degree of discretion to the city manager in the city manager's removal and appointment of employees, and it further prohibits the city council from "dictat[ing]" the city manager's decisions in that regard. Bolton depends on this discretion – and its coordinate lack of review – to demonstrate that Benavides is a final policymaker. But, as we discussed above, neither complete discretionary authority nor the unreviewability of such authority automatically results in municipal liability.[5] There must be more. And Bolton points to no other relevant source of law showing that the City vested Bolton with policymaking power.

---

[5] Bolton cites *Neubauer v. City of McAllen,* 766 F.2d 1567, 1573-74 (5th Cir. 1985), *overruled on other grounds by Walther v. Lone Star Gas Co.,* 952 F.2d 119 (5th Cir. 1992), for the proposition that a city manager with final discretion to make employment decisions is necessarily a final policymaker. But we have not understood *Neubauer* to announce such a broad rule or to be inconsistent with *Pembaur. See Jett v. Dallas Indep. Sch. Dist.,* 798 F.2d 748, 759 (5th Cir. 1986), *aff'd in part and remanded in part on other grounds,* 491 U.S. 701 (1989). And the Charter here imposes limitations on the city manager not present in *Neubauer. See* 766 F.2d at 1573-74.

Further, Chapter XII, § 5, of the Charter – the relevant local law quoted earlier – prohibits the specific action taken by Benavides. Thus, absent some contrary custom not shown here, Benavides's action clearly does not represent final policy with respect to the removal of city officials like Bolton. It is the Charter that announces the City's policy in this regard. *See Barrow,* 480 F.3d at 382 ("[A]n official whose discretionary decisions on a particular matter are final and unreviewable, meaning they can't be overturned, is constrained if another entity has ultimate power to guide that discretion, at least prescriptively, whether or not that power is exercised." (footnotes omitted)); *Auriemma,* 957 F.2d at 400 ("Liability for unauthorized acts is personal; to hold the municipality liable, *Monell* tells us, the agent's action must implement rather than frustrate the government's policy."); *Praprotnik,* 485 U.S. at 127. There is no argument that Benavides was generally free to disregard the Charter,[6] or that the City had a custom of permitting such disregard. And Bolton has not shown that Benavides was vested with

---

[6] Bolton makes an ill-defined argument that the City did assert in earlier litigation that Benavides was free to disregard Chapter XII, § 5, of the Charter and that its statements in this respect should now be held against the City lest the integrity of the courts be compromised. Bolton calls these statements "judicial admissions," although his argument also has the characteristics of a request for estoppel. In any case, it is evident that the City's position now is a direct consequence of our earlier ruling in Bolton's favor. We find no reason to prevent the City from advancing such an argument in this case.

policymaking authority such that municipal liability should attach despite the existence of a contrary city policy. *See Bennett,* 74 F.3d at 586. Benavides was therefore not the final policymaker with respect to his decision to terminate Bolton and municipal liability cannot attach to that decision.

V.

Because state and local law demonstrate that Ted Benavides was not a final policymaker with respect to his decision to terminate the employment of Terrell Bolton, the City of Dallas cannot be held liable for that termination. Accordingly, the district court's grant of summary judgment in favor of Dallas is AFFIRMED. The motions before us are DENIED as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TERRELL BOLTON, Plaintiff,	§	
VS.	§	Civil Action No.
CITY OF DALLAS, TEXAS, et al., Defendants.	§	3:04-CV-0501-D

MEMORANDUM OPINION
AND ORDER

(Filed Aug. 17, 2007)

In this suit by a terminated Chief of Police under 42 U.S.C. § 1983 alleging that his Fourteenth Amendment rights to due process and equal protection were violated when he was discharged rather than reassigned to a lower rank, the dispositive question presented by defendants' motion for summary judgment is whether the conduct of the City Manager who discharged the plaintiff is attributable to the defendant City. Concluding that the City cannot be held liable under § 1983 for the City Manager's unauthorized departure from City policy, the court grants defendants' motion and dismisses this case with prejudice.

I

This is an action by plaintiff Terrell Bolton ("Bolton") against defendant City of Dallas, Texas ("City") and its former City Manager, defendant Teodoro Benavides ("Benavides"). Bolton served as Chief of Police of the Dallas Police Department ("DPD") from October 1, 1999, until Benavides terminated him on August 26, 2003.[1] Bolton alleges that the City and Benavides are liable under §1983 for violating his Fourteenth Amendment due process and equal protection rights. Specifically, he complains that defendants violated these rights by terminating his employment rather than reassigning him to the last civil service rank he held prior to being appointed to the executive ranks of the DPD.

Appointment to the executive rank position of Chief of Police is made at the discretion of the City Manager, who, during Bolton's tenure as Chief of Police, was defendant Benavides. In addition to Chief of Police, the appointed executive ranks of the DPD include the Deputy Chief of Police, Assistant Chief of Police, and any other positions as may be created or designated by the Chief of Police. The civil service ranks of the DPD are (in descending order) Captain,

---

[1] The court recounts the evidence in a light favorable to Bolton as the summary judgment nonmovant and draws all reasonable inferences in his favor. *E.g.*, *U.S. Bank Nat'l Ass'n v. Safeguard Ins. Co.*, 422 F.Supp.2d 698, 701 n.2 (N.D. Tex. 2006) (Fitzwater, J.) (citing *Clift v. Clift*, 210 F.3d 268, 270 (5th Cir. 2000)).

Lieutenant, Sergeant, Senior Corporal, and Police Officer. Unlike the executive ranks, promotions within the civil service ranks require competitive service examinations.

Before his appointment as Chief of Police, Bolton had held the executive rank positions of DPD Assistant Chief for eight years, Deputy Chief for three years, Manager of Building Security for approximately one year (a civilian position), and, before that, the civil service rank of Sergeant. At the time he was appointed Chief of Police, Bolton had approximately twenty years of service with the DPD.

In August 2003 Benavides determined that Bolton was unfit for the position of Chief of Police and advised him that he had been terminated. Bolton was not reassigned to a lower rank within the DPD. In a letter, Benavides listed a "series of issues" that caused him to determine that "new leadership for the [DPD was] needed." 2d Am. Compl. 118 (brackets in original). Benavides conceded that he did not terminate Bolton for cause.

Following his termination, Bolton filed this lawsuit against the City and Benavides, alleging that under Chapter XII, § 5 of the Dallas City Charter, he had a protected property interest in continued employment with the DPD and that, by arbitrarily and capriciously denying him reassignment within the DPD, Benavides and the City had violated his Fourteenth Amendment rights to due process and equal

protection. Chapter XII, § 5 of the Dallas City Charter provides,

> If the chief of the police department . . . was selected to that position from the ranks of the police department and is removed from the position on account of unfitness for the discharge of the duties of the position, and not for any cause justifying dismissal from the service, the chief . . . shall be restored to the rank and grade held prior to appointment to the position, or reduced to a lower appointive rank.

Dallas, Tex., City Charter Ch. XII, § 5 (repealed 2005).

This lawsuit was initially assigned to another member of this court. Defendants moved for summary judgment, and the court granted the motion, holding that Bolton lacked a constitutionally protected property interest in further employment with the DPD. *Bolton v. City of Dallas,* 2005 U.S. Dist. LEXIS 20543, at *8 (N.D. Tex. Sept. 20, 2005) (Kinkeade, J.), rev'd in part, dism'd in part, 472 F.3d 261 (5th Cir. 2006). The Fifth Circuit reversed in part, concluding that Chapter XII, § 5 of the Dallas City Charter did create a constitutionally protected property interest in Bolton's continued employment at the rank and grade held before his appointment to the executive position, and it remanded the case. *Bolton v. City of Dallas, Tex.,* 472 F.3d 261, 265 (5th Cir. 2006) ("*Bolton I*"). The Fifth Circuit dismissed Bolton's action against Benavides in his individual capacity, concluding that

Benavides was entitled to qualified immunity because reasonable public officials could have differed on whether discharging Bolton would violate his constitutional rights. Id. at 266. Following remand and the decision of the presiding judge to recuse, the case was reassigned. Bolton filed a second amended complaint, and defendants obtained leave to file a second motion for summary judgment.

Defendants contend that the decision to terminate Bolton was not arbitrary or capricious; Bolton did not have a property interest in continued employment with the DPD because he was not appointed to the executive ranks from the sworn ranks; Benavides is entitled to summary judgment because the Fifth Circuit concluded in *Bolton I* that he is entitled to qualified immunity; Bolton's claims for punitive damages should be dismissed because punitive damages are not recoverable under § 1983; and the City is not liable under § 1983 for Benavides's decision to terminate Bolton's employment. Bolton opposes defendants' motion.

II

The court begins with defendants' contention that Benavides is entitled to summary judgment insofar as he is sued in his official capacity. Defendants maintain that the official-capacity claim must be dismissed on the ground that it is duplicative of, and merges with, Bolton's action against the City. The court agrees. A suit against a government official in

his official capacity is "only another way of pleading an action against an entity of which [the official] is an agent." *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 n.55 (1978). If the government entity receives notice and an opportunity to respond, an "official capacity suit" is treated as a suit against the entity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). A suit against a municipal official in his official capacity is not a suit against the official personally, because the real party in interest is the entity. Id. at 166. Thus there is no longer any need to bring official-capacity actions. Accordingly, the court dismisses Bolton's § 1983 claim against Benavides in his official capacity.

III

To recover against the City on his § 1983 claim, Bolton must establish that the City is liable for Benavides's conduct. Defendants maintain that Bolton cannot meet this burden. Again, the court agrees.

A

Although municipalities are "persons" under § 1983, *see Monell*, 436 U.S. at 690, they cannot be held liable simply on a theory of respondeat superior, id. at 691. Rather, liability obtains only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,

inflicts the injury[.]" Id. at 694. "Normally, a plaintiff must identify a policy or custom that gave rise to the plaintiff's injury before he may prevail." *Gelin v. Hous. Auth. of New Orleans,* 456 F.3d 525, 527 (5th Cir. 2006) (citing *Canton v. Harris,* 489 U.S. 378, 389 (1989)). "It is well-established, however, that a single decision by an official can be grounds for section 1983 liability where the decision was rendered by an individual with 'final policy making authority.'" Id. (citing *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 737 (1989); *Brady v. Fort Bend County,* 145 F.3d 691, 698 (5th Cir. 1998)). "Where liability is based upon a single decision by an official, '[a] court's task is to identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" *Id.* (quoting *McMillian v. Monroe County, Ala.,* 520 U.S. 781, 784-85 (1997) (some internal quotation marks omitted)). "[T]he identification of those officials whose decisions represent the official policy of the local governmental unit" is a question of state law "to be resolved by the trial judge *before* the case is submitted to the jury." *Jett,* 491 U.S. at 737.

B

Defendants argue that the City is not liable for Benavides's decision to terminate Bolton as Chief of Police. They maintain that Bolton cannot point to any facts regarding any official City policy or custom that

deprived him of his constitutional rights, arguing that Benavides's decision not to reassign him to another position was an isolated incident that is insufficient to constitute final official policy. Defendants next argue that Bolton cannot establish liability against the City because he cannot show that his termination and the failure to reassign him to another position were the decisions of a policymaker. They posit that to determine whether the City is liable, the court must decide whether the injury was caused by the act of an employee taken pursuant to his role as a policymaker or whether the conduct was undertaken as a decisionmaker in execution of a policy for which the City is the policymaker.

Defendants argue that this case falls within the latter category. They point to various provisions of the Dallas City Charter that they allege establish that the City Council is the policymaker for all City personnel policies. Defendants maintain that although the City Manager is vested with discretion to appoint and remove directors of departments, including within the DPD, he is not the policymaker with respect to the City's employment policies. Rather, his responsibility is to implement the policies set by the City Council. Defendants contend that the Civil Service Board is the only entity authorized to make rules and regulations, which are then subject to City Council approval; there is no provision of the Charter that delegates policymaking authority to the City Manager; although the City Manager is vested with authority to hire and replace executive rank employees,

that is as far as his authority extends; and if Benavides exercised his authority in an unconstitutional manner, the decision to act unlawfully was not the decision of the City.

Bolton responds that proof that an individual lacked authority to make other decisions is not relevant to the question whether he was the policymaker with respect to the precise act at issue. He maintains that defendants' argument that the City Council was the "real" policymaker fails because the City Charter specifically forbids the Council from making a decision to remove the Chief of Police.

In reply, defendants point out that Chapter XII, § 5 of the Dallas City Charter sets forth the policy of the City with respect to removing and retaining executive rank officers, and that the City Manager is responsible for administering that policy, which Benavides did when he terminated Bolton. Defendants argue that the City Charter vests all authority in the City Council and establishes that the scope of the City Manager's authority is limited to the "proper administration of all the city affairs placed in his hands." Ds. Reply Br. 15 (bold font omitted) (quoting Dallas, Tex. City Charter Ch. VI, § 2(1)). They therefore maintain that Benavides was a decisionmaker, not a policymaker, under authority conferred upon him by the City Charter, which made him responsible to the City Council for his decisions. Defendants therefore contend that if his decision to terminate Bolton was wrong, it was not the decision of the City, and the City cannot be held liable under § 1983.

C

The court will assume *arguendo* that Bolton's Fourteenth Amendment rights were violated when Benavides decided to terminate, rather than reassign, him, as required by Chapter XII, § 5 of the City Charter when a Chief of Police who is selected from the ranks of the DPD is not terminated for cause. The court will also assume *arguendo* that Bolton was selected from the ranks. Even so, Bolton cannot establish that this alleged constitutional injury was caused by the "execution of a government's policy or custom," such that the City is subject to liability under § 1983. *Monell,* 436 U.S. at 694. Bolton does not dispute that Benavides's decision was an isolated incident insufficient to constitute an "official policy" of the City. *See* P. *Br.* 9 (pointing out that Bolton does not contend that the City can be liable based on a "longstanding custom or practice"). Consequently, to determine whether the City can be held liable under § 1983 for Benavides's decision, the court must decide whether Benavides "possesse[d] final authority to establish municipal policy with respect to the action ordered." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 481 (1986). In other words, the court must determine whether Benavides was a final policymaker with respect to the precise act in question: terminating rather than reassigning Bolton

It is undisputed that Benavides had complete discretion to remove Bolton from the position of Chief of Police. In fact, as Bolton points out in his brief, the City Charter expressly forbids the City Council from

interfering with Benavides's hiring and firing decisions. It provides:

> Neither the council nor any of its committees or members shall dictate or attempt to dictate any person's appointment to, or removal from, office or employment by the city manager or any of the city manager's subordinates, or in any manner interfere in the appointment of officers and employees in the departments of administrative service vested in the manager by this Charter.

Dallas, Tex. City Charter, Ch. III, § 15. But the Charter does not vest in Benavides any discretion regarding whether, after removing the Chief of Police from that position, he should be restored to a prior or lower appointive rank within the DPD. The Charter explicitly provides that "the chief or the assistant *shall* be restored to the rank and grade held prior to appointment to the position, or reduced to a lower appointive rank." Dallas, Tex. City Charter Ch. XII, § 5 (emphasis added). "The word 'shall' implies that restoration to a lower rank and grade is mandatory." *Bolton I,* 472 F.3d at 265 (citing *Valdez v. Cockrell,* 274 F.3d 941, 950 (5th Cir. 2001)).

"When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988). Although Benavides was vested with discretion in deciding whether to remove Bolton from the position

of Chief of Police, his ability to terminate rather than reassign Bolton was constrained by the limitations of Chapter XII, § 5.

In *Auriemma v. Rice,* 957 F.2d 397 (7th Cir. 1992), which the Fifth Circuit cited with approval in its recent decision in *Barrow v. Greenville Independent School District,* 480 F.3d 377 (5th Cir. 2007),

> the Seventh Circuit concluded that the Chicago Police Chief, who by city ordinance had unreviewable discretion to make personnel decisions, would not have set city policy in allegedly discriminating by race. Rather, the Chief would have violated city policy, embodied in another city council ordinance generally forbidding racial discrimination in hiring.

Id. at 382. Specifically, the Seventh Circuit explained in *Auriemma* that "[l]iability for unauthorized acts is personal; to hold the municipality liable, *Monell* tells us, the agent's action must implement rather than frustrate the government's policy." *Auriemma,* 957 F.2d at 400.

As set forth in Chapter XII, § 5, it was City policy at the time Bolton was discharged that when the Chief of Police is selected from within the ranks and is not removed for cause, he is entitled to continued employment with the DPD at his prior position or at a lower appointive rank. As City Manager, Benavides was "[t]o be responsible to the [city] council for the proper administration of all the city affairs placed in

the city manager's hands." Dallas, Tex. City Charter Ch. VI, § 2(1). The *proper* administration of all the city affairs would certainly have required that Benavides follow the mandatory directives of the City Charter. No provision of the City Charter gave Benavides the power to make policies for the City in the area of employment or to act in contravention of the mandates of the City Charter. Benavides was vested under Chapter VI, § 2(3) with the power to remove heads of departments and subordinate officers and employees. But in tasking the City Manager with the appointment and removal of all heads of departments, the City Charter did not give Benavides any final policymaking authority regarding what happened to these heads of departments when another Charter provision mandated their continued employment. In fact, Bolton advances several arguments in his brief that inferentially defeat his contention that 'Benavides was a final policymaker with respect to the decision to discharge rather than reassign Bolton. *See* P. Br. 1 (arguing that City Manager lacked discretion under City Charter to terminate rather than demote Chief of Police who came from the DPD ranks and was not discharged for cause), 6 ("Here, the City's termination of Bolton was clearly arbitrary and capricious – given that this action was contrary to law (i.e., the Dallas City Charter)."), 8 ("Benavides knew full-well that the Dallas City Charter required that Bolton be demoted[.] . . . [H]e ignored the plain language of the City Charter."), 12 ("[Benavides] did not have the discretion to simply flaunt the law. His decision to do

so certainly has the hallmarks of being both arbitrary and capricious."), and 13 (referring to "the mandatory language of the Charter itself."). The court therefore concludes that Benavides's failure to follow Chapter XII, § 5 was an unauthorized departure from City policy and, as such, varied from, rather than represented, City policy. *See Auriemma*, 957 F.2d at 400. The decision to discharge rather than reassign Bolton was a departure from the City's expressed policy, not an exercise by Benavides of final policymaking authority. Accordingly, the court holds that the City cannot be held liable for Benavides's failure to restore Bolton to the rank and grade he held prior to his appointment to the position of Chief of Police, or his failure to reduce him to a lower appointive rank. The court therefore grants defendants' motion for summary judgment dismissing Bolton's § 1983 claim against the city.[2]

* * *

For the foregoing reasons, the court grants defendants' May 7, 2007 motion for summary judgment and dismisses Bolton's § 1983 claims against Benavides in his official capacity and against the City. This case is dismissed with prejudice by judgment filed today.

---

[2] Having determined that neither Benavides nor the City can be held liable for Bolton's alleged constitutional deprivations, the court need not address defendants' other grounds for summary judgment.

SO ORDERED.

August 17, 2007.

/s/ SIDNEY A. FITZWATER
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

In the
United States Court of Appeals
for the Fifth Circuit

No. 05-11141

TERRELL BOLTON,

Plaintiff-Appellant,

VERSUS

THE CITY OF DALLAS, TEXAS,
AND
TEODORO BENAVIDES,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:04-CV-0501-K

(Filed Dec. 7, 2006)

Before SMITH, BENAVIDES and PRADO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Terrell Bolton appeals a summary judgment in favor of the defendants, the City of Dallas and its city manager, Teodoro Benavides. Bolton sued under 42 U.S.C. § 1983, alleging that the city had terminated him from his position as Chief of Police in violation of the due process clause of the Fourteenth Amendment.

The district court concluded that Bolton lacked a constitutionally-protected property interest in further employment with the Dallas Police Department ("DPD"). Because Chapter XII, § 5 of the Dallas City Charter creates a constitutionally-protected property interest, we reverse and remand. We also conclude that Benavides's successful defense of qualified immunity requires dismissal of Bolton's claims against Benavides in his individual capacity.

I.

Bolton served as an executive-rank officer of DPD for fifteen years and in August 1999 was promoted from assistant chief to chief. In August 2003 city manager Ted Benavides terminated his employment. Benavides acknowledges that the dismissal was not for cause. Bolton claims the city charter mandates that he be restored to the rank and grade he held before being appointed chief.

II.

We review a summary judgment *de novo,* applying the same standard as did the district court. *Morris v. Powell,* 449 F.3d 682, 684 (5th Cir. 2005), *cert. denied*, 2006 U.S. LEXIS 8734 (U.S. Nov. 13, 2006). All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Minter v. Great Am. Ins. Co.,* 423 F.3d 460, 465 (5th Cir. 2005). Summary judgment is appropriate where the record

demonstrates that there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *Martinez v. Bally's La., Inc.*, 244 F.3d 474, 476 (5th Cir. 2001).

III.

To succeed on a due process claim in the context of public employment, a plaintiff must show that (1) he had a property interest/right in his employment and (2) his termination was arbitrary or capricious. *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993) (citing *Honore v. Douglas*, 833 F.2d 565, 568 (5th Cir. 1987)). Because the district court granted summary judgment based on its finding that Bolton lacked a property interest in his employment, we address only the first prong.

Although public employees can be endowed with constitutionally-protected property interests in their employment,[1] a property interest is not incidental to public employment and must be located in an independent source, such as state law. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). "A property interest is created where the public entity has acted to confer, or alternatively, has created conditions that infer [*sic*,

---

[1] *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997) (stating that "employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

imply?], the existence of a property interest by abrogating the right to terminate an employee without cause." *Muncy v. City of Dallas,* 335 F.3d 394, 398 (5th Cir. 2003). A public entity can confer a property interest in public employment through a local ordinance. *Bishop v. Wood,* 426 U.S. 341, 344 (1976).[2]

Bolton claims that Chapter XII, § 5 of the charter grants him a property interest in continued employment. It states,

> If the chief of the police department . . . was selected to that position from the ranks of the police department and is removed from the position on account of unfitness for the discharge of the duties of the position, and not for any cause justifying dismissal from the service, the chief . . . shall be restored to the rank and grade held prior to appointment to the position, or reduced to a lower appointative rank.

DALLAS, TEX., CITY CHARTER ch. 12, § 5 (2006).

We examined this section in *Muncy,* 335 F.3d 394. In that case, two executive-rank DPD officers

---

[2] Under Texas law, home rule cities "may determine by charter whether employment in certain city offices is at will or continuous absent just cause for dismissal, and Texas courts will give effect to such charter provisions." *Henderson v. Sotelo,* 761 F.2d 1093, 1096 (5th Cir. 1985) (citing *Ratliff v. City of Wichita Falls,* 115 S.W.2d 1153 (Tex. Civ. App. – Amarillo 1938, writ dism'd), and *City of San Benito v. Cervantes,* 595 S.W.2d 917 (Tex. Civ. App. – Eastland 1980, writ ref'd n.r.e.)).

challenged demotions to the highest-rank appointments they had held before receiving their executive appointments. They contended that a myriad of sources, including § 5, granted them a protected property interest in their *executive-rank* positions. In examining § 5, we noted that "unfitness for duty" is "a nebulous status which conceivably could encompass political unsuitability or any number of other reasons that fall short of the property-interest conferring, termination-for-cause standard." *Id.* at 399. We found this particularly true given that the statute internally defines "unfitness for duty" as "not for any cause justifying dismissal." *Id.* Interpreting the provision as a whole, we noted that it "contemplates that high level officials will be removed from time to time, and in those instances in which the removal is not for a cause warranting dismissal, then the official will be reassigned within the department." *Id.*

Although the city points to language in *Muncy* indicating that § 5 serves primarily as a limit on the city's ability to retain former executives, *id.* at 399-400, it is evident that *Muncy* does not control the instant case. Unlike the plaintiffs in *Muncy,* Bolton claims a property interest not in his executive-rank position, but rather in continued employment at the rank and grade held before his appointment to the executive position. His argument does not rely on the "unfitness for duty" language, but rather on the "for any cause justifying dismissal" language. He asserts that § 5, by its reference to "any cause justifying

dismissal from the service," creates a property interest in continued employment.

The plain language of the charter supports Bolton's reading. "If the chief . . . is removed . . . not for any cause justifying dismissal from the service," tracks language that elsewhere has been found to create a property interest.[3] The word "shall" implies that restoration to a lower rank and grade is mandatory.[4]

Even if we were to look beyond the plain language, this interpretation makes sense. The chief of police is a political position, and a chief might be removed for any number of reasons beyond his control. Through this charter provision, Dallas is ensuring officers with considerable length of service that accepting an unstable job will not force them to forfeit their long tenure within the DPD. It reflects a

---

[3] *See Perry*, 408 U.S. at 600-03 (holding that guidelines stating that an employee "may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing" create a protected property interest); *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1199 (5th Cir. 1987) (finding a protected property interest where an employee handbook "contained a provision that employees would be discharged only for good cause"); *United Transp. Union v. Brown*, 694 S.W.2d 630 (Tex. App. – Texarkana 1985, writ ref'd n.r.e.) (finding a protected property interest where "the manual of working conditions provides that no employee will be demoted without good cause").

[4] *See, e.g., Valdez v. Cockrell*, 274 F.3d 941, 950 ("The word 'shall' is mandatory in meaning.").

balance between the city's interest in attracting high quality applicants and its interest in ensuring effective oversight of the officers who fill executive positions.

The city responds by claiming that the two grounds for removal in the charter – "unfitness for duty" and "for cause justifying dismissal" – do not exhaust the field of possible reasons for removal of an executive officer. Although admitting that Bolton was not removed for cause, the city alleges that he was discharged because his continued presence would be "disruptive" rather than because he was unfit for duty, a reason for removal that would not trigger § 5. We do not ascribe the same talismanic significance to "unfitness for duty." The language that creates a property interest is "not for any cause justifying dismissal." If a chief promoted from within the ranks is not removed for cause, by the plain language of the charter he must be restored to his previous position.[5]

---

[5] The City raises alternative grounds for affirmance: that § 5 does not apply to Bolton, because he was not selected chief from "the ranks of the department" and that the city is immune from suit under § 1983 because Bolton has not pointed to a policy or custom that violates his rights. Because the district court concluded that Bolton did not possess a protected property right, it did not address the factual disputes raised by the city or whether the city's policy or custom played a role in the violation of Bolton's rights. We leave these arguments for the district court on remand. *See Sanders v. English*, 950 F.2d 1152, 1159 n.13 (5th Cir. 1992).

IV.

Benavides asserts in the alternative that any claims against him in his personal capacity should be dismissed because he is entitled to qualified immunity. Although the district court did not address the qualified immunity claim, Benavides asserted the defense in his answer and raised it in this appeal, so we may address it.

Once a public official has raised the defense of qualified immunity, the burden rests on the plaintiff to rebut it.[6] On a motion for summary judgment, the disputed facts to which the plaintiff points must be sufficient, if plaintiff's version is accepted, for a reasonable trier of fact to determine (1) that the defendant violated the plaintiff's constitutional rights and (2) that the violation was objectively unreasonable. *See Fraire v. City of Arlington,* 957 F.2d 1268, 1273 (5th Cir. 1992). The inquiry into reasonableness asks "whether '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right.'" *Id.* (citing *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). If reasonable public officials could differ as to whether the defendant's actions were lawful, the defendant is entitled to immunity. *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

---

[6] *See Pierce v. Smith,* 117 F.3d 866, 871-72 (5th Cir. 1997) ("We do not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs.").

Although we now conclude that § 5 of the Dallas City Charter creates a vested property right in employment at a former rank for executive-level officials, this decision is not apparent from *Muncy*. There we were considering a due process claim in the context of demotion, but we stated that executive rank officials are "employees at will, and the city was free to discharge them without cause." *Muncy,* 335 F.3d at 402. If we are to respect the principle underlying qualified immunity to the effect that officials must be able reasonably to "anticipate when their conduct may give rise to damages," we cannot hold an official liable for taking action that was arguably supported by decisions of this court. *See Davis v. Scherer,* 468 U.S. 183, 195-96 (1984). Bolton's claim against Benavides in his personal capacity must be dismissed based on qualified immunity, because reasonable public officials could have differed on whether discharging Bolton would violate his constitutional rights.

In summary, because the charter creates for Bolton a constitutionally protected property interest in further employment, the judgment is REVERSED. Bolton's claims against Benavides in his individual capacity are DISMISSED based on qualified immunity. The remaining claims are REMANDED for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TERRELL BOLTON, Plaintiff,	§	
v.	§	Civil Action No. 3:04-CV-0501-K
CITY OF DALLAS, et al., Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Sept. 20, 2005)

The Court has before it Defendants' Motion for Summary Judgment. Because Plaintiff Terrell Bolton ("Plaintiff") was terminated and not demoted, Chapter 12, Section 5 of the Dallas City Charter confers no property rights on Plaintiff and for that reason, the Court **GRANTS** the motion.

I. Factual Background

Plaintiff was appointed Chief of Police of the Dallas Police Department ("DPD") on August 20, 1999, to be effective October 1, 1999. On August 27, 2003, Defendant Ted Benavides ("Benavides"), Dallas City Manager, terminated Plaintiff's employment. At the time of termination, Benavides did not state the reason for the action. At a later date, upon the request of Plaintiff's counsel, Benavides stated in a letter twenty reasons for the action. Benavides testified at his

deposition that Plaintiff was not terminated for cause.

II. Legal Standards

Summary judgment is appropriate when the pleadings, affidavits and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The moving party bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 322-25, Once a movant makes a properly supported motion, the burden shifts to the nonmovant to show the existence of a genuine fact issue for trial; but, the nonmovant may not rest upon allegations in the pleadings to make such a showing. *Id.* at 321-25; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255-57 (1986). The nonmovant may satisfy this burden by providing depositions, affidavits, and other competent evidence; not with "conclusory allegations, speculation, and unsubstantial assertions." *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Neither merely colorable evidence nor a mere scintilla of evidence can defeat a motion for summary judgment. *Anderson,* 477 U.S. at 249-52. All evidence and reasonable inferences must be viewed in the light most favorable to the nonmovant. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

III. Property Interest

In his First Amended Complaint, Plaintiff claims he has "a constitutionally protected property interest in continued employment with the DPD at the last Civil Service Rank he held prior to being appointed to the Executive Ranks." Plaintiff contends the language of Chapter 12, Section 5 of the Charter confers this property interest on him. Section 5 states:

> If the chief of the police department . . . was selected to that position from the ranks of the police department and is removed from the position on account of unfitness for the discharge of the duties of the position, and not for any cause justifying dismissal from the service, the chief . . . shall be restored to the rank and grade held prior to appointment to the position, or reduced to a lower appointive rank.

Defendants contend Plaintiff did not have a property interest in his continued employment with the DPD. Specifically, they argue Section 5 did not vest Plaintiff with a property interest because (1) he was not appointed to the executive position from the ranks of the department, (2) he was not terminated for unfitness, and (3) Benavides had sufficient reason to terminate Plaintiff.

Plaintiff responds that Section 5 vested him with a property interest in continued employment with the department because, since he was not removed "for cause," Section 5 required he be demoted rather than terminated.

A. Termination for Unfitness

The Court looks first to Defendants' argument that Section 5 did not vest Plaintiff with a property interest in his continued employment with the DPD because he was not terminated for unfitness. The Court finds the opinions issued by the Fifth Circuit and this district court in *Muncy v. City of Dallas* to directly address the issue before the Court in this case. *Muncy v. City of Dallas,* 2001 WL 1480770, Civ. Nos. 99-CV-2960P, 00-CV-0588H (N.D. Tex. Nov. 19, 2001) (Solis, J.), *aff'd,* 335 F.3d 394 (5th Cir. 2003). In *Muncy,* the plaintiff-police officers had been removed from their appointed executive level positions with the DPD and returned to their prior civil service ranks prior to their complaints being filed against the City. One plaintiff had been Executive Assistant Chief of Police, the second highest command position within the DPD, then was removed and demoted to Sergeant, his highest rankposition before being appointed to an executive level position. The other plaintiff had been Deputy Chief of Police, but was demoted to Lieutenant, his highest rank position. The plaintiffs argued Section 5 conferred on them a property interest in their appointed positions. This court held:

> Section 5 is a very specific provision applicable only to one very limited circumstance. Section 5 sets out the procedure for *demotion* of an employee who was promoted to a high-ranking police position who was found to be unfit for such position. The Charter sets out

> a provision for dealing with this limited circumstance; it does not provide a blanket property right for all high-ranking police officials.

Muncy, 2001 WL 1480770 at *7 (emphasis added). On appeal, the Fifth Circuit concluded, "Section 5 does not serve as a limit on the City's ability to remove in the first instance, but rather it serves as a limit on the City's ability to retain a former executive at his previous rank." *Muncy,* 335 F.3d at 399-400. The Fifth Circuit found that an employee at an executive level *may* be retained in the police department only when "the 'unfitness for duty' does not rise to the level of 'cause warranting dismissal.'" *Id.* at 399. The court also pointed out that removal of an executive level employee is not conditioned on cause or even unfitness. *Id.* Rather, Section 5 addressed only this specific instance of the City's ability to retain an employee. *See id.* at 399-400.

This Court acknowledges the property interest the *Muncy* plaintiffs claimed was one in their continued employment in their executive level positions, while this Plaintiff claims a property interest in his continued employment in his prior civil service rank prior to being in an executive level position. Despite this difference, the analysis in the *Muncy* opinions are on point, directly addressing the issue of whether Section 5 confers any property rights to an executive level employee. Both courts analyzed in depth Section 5 and to what situations it was intended to apply. This Court understands these opinions to hold that

Section 5 was intended to apply only to situations involving the choice of the City to retain an executive level employee removed from his position. Section 5 was not intended to provide the City an either/or scenario in relation to the removal of an executive level employee, in that either the employee is unfit for duty and thereby demoted, or the employee is terminated for cause. The *Muncy* opinions establish for this Court that Section 5 was not intended to limit the City to only two reasons for removing or terminating an executive level employee, that being either unfitness or cause. *Muncy* stands for the proposition that the City manager may terminate the police chief or the City manager may demote the police chief. If the City manager chooses to demote the police chief, then the police chief shall be placed at his prior civil service position just before becoming chief. This case applies to the situation involving the level to which an executive level employee *may* be demoted if not fired.

Applying the courts' reasoning and holdings in this case, this Court finds that Section 5 does not confer any property rights to Plaintiff. Section 5 does not apply in this case because Plaintiff was terminated, not demoted, and the *Muncy* opinions establish that Section 5 was intended to apply only to situations involving the demotion of an executive-level position. *See Muncy,* 335 F.3d at 399-400; *Muncy,* 2001 WL 1480770, at *6-7.

Because the Court finds Plaintiff did not have a property interest in his prior rank position, the Court

need not address the viability of Plaintiff's remaining claims.

IV. Conclusion

The Court finds case law clearly provides that Plaintiff did not have a property interest in his prior rank position with the DPD by virtue of Section 5. Accordingly, because no fact issue exists, the Court **GRANTS** Defendants' motion for summary judgment.

SO ORDERED.

Signed September 20th, 2005.

s/ Ed Kinkeade
ED KINKEADE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10999

TERRELL BOLTON

Plaintiff-Appellant

v.

CITY OF DALLAS TEXAS; CITY MANAGER TEODORO BENAVIDES, In His Official Capacity

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Filed Sept. 9, 2008)

(Opinion 8/7/08, 5 Cir. ___, ___ F.3d ___)

Before JOLLY, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

STATUTE AND CHARTER PROVISIONS INVOLVED

Section 1983 of 42 U.S.C. provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Chapter III, section 15 of the Dallas City Charter provides:

> Neither the council nor any of its committees or members shall dictate or attempt to dictate any person's appointment to, or removal from, office or employment by the city manager or any of the city manager's subordinates, or in any manner interfere in the appointment of officers and employees in the departments of administrative service vested in the manager by this Chapter.

Chapter XII, section 5 of the Dallas City Charter provided at all relevant times*:

---

* This provision was repealed in 2005, several years after the events giving rise to this action. (App. 18a).

If the chief of the police department . . . was selected to that position from the ranks of the police department and is removed from the position on account of unfitness for the discharge of the duties of the position, and not for any cause justifying dismissal from the service, the chief . . . shall be restored to the rank and grade held prior to appointment to the position, or reduced to a lower appointive rank.

121

(3)

No. 08-704

Supreme Court, U.S.
FILED
FEB 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRELL BOLTON,

Petitioner,

v.

CITY OF DALLAS, TEXAS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

Allen Butler
Foster Reese III
HUNTON & WILLIAMS LLP
1445 Ross Avenue,
Suite 3700
Dallas, TX 75202-2799

Thomas C. Goldstein
Counsel of Record
William F. Allen
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a municipality is liable under 42 U.S.C. § 1983 for its agent's violation of a mandatory municipal policy.

TABLE OF CONTENTS

QUESTION PRESENTED i
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE WRIT 4
CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Angarita v. St. Louis County,
981 F.2d 1537 (8th Cir. 1992) 9

Bennett v. Slidell,
728 F.2d 762 (5th Cir. 1984) 10

Bishop v. Wood,
426 U.S. 341 (1976) 4

Hudson v. Michigan,
547 U.S. 586 (2006) 7

Lytle v. Carl,
382 F.3d 978 (9th Cir. 2004) 8

Martinez v. City of Opa-Locka,
971 F.2d 708 (11th Cir. 1992) 8

Monell v. Department of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978) ..... *passim*

Monroe v. Pape,
365 U.S. 167 (1961) 6

Perry v. Sinderman,
408 U.S. 593 (1972) 4

Randle v. City of Aurora,
69 F.3d 441 (10th Cir. 1995) 9

Statutes

42 U.S.C. § 1983 ..... *passim*

STATEMENT OF THE CASE

Petitioner alleges that the city manager of respondent City of Dallas was required to appoint petitioner to a particular job under the express and mandatory terms of the city's charter. As is relevant here, petitioner specifically alleges that respondent is liable for the city manager's conduct. The court of appeals held that such a claim is self-defeating: petitioner's assertion that the city manager *violated* the "official policy" (*Monell v. Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978)) of respondent set forth in the city charter negated any claim of municipal liability.

1. Petitioner is the former police chief of respondent City of Dallas, Texas, a position to which he was promoted from assistant chief. In 2003, the city manager fired petitioner as chief of police on the ground that petitioner was unfit to serve in the position.[1] Petitioner contends that the city's charter required the city manager to appoint him to the lower-level rank of sergeant in the police department rather than terminating his employment. At the time, the city charter provided:

> If the chief of the police department, or any assistant above the rank and grade of captain, was selected to that position from

---

[1] The factual recitation is drawn from the lower court opinions, which accepted respondent's factual allegations and construed them in his favor on summary judgment. In any trial, respondent would of course have the right to contest those factual claims, which are assumed here only *arguendo*.

> the ranks of the police department and is removed from the position on account of unfitness for the discharge of the duties of the position, and not for any cause justifying dismissal from the service, the chief or the assistant shall be restored to the rank and grade held prior to appointment to the position, or reduced to a lower appointive rank.

Dallas Tex. City Charter ch. XII, § 5 (2001), *repealed* Nov. 8, 2005.

The petition for certiorari involves petitioner's claims against respondent City of Dallas, not against the city manager (who was previously dismissed from the case on the ground of qualified immunity). Petitioner sued the city under 42 U.S.C. § 1983 alleging (i) that the city manager had violated petitioner's constitutional rights by terminating his employment, and (ii) that respondent was liable for the city manager's decision. Petitioner's constitutional claim rests on the assertion that the clear and mandatory terms of the city charter give him a constitutionally protected property interest in an appointment to a lower-level position in the police department.

The district court initially dismissed the lawsuit (Pet. App. 39a-45a) but the Fifth Circuit ordered it reinstated (*id.* 30a-38a). The court of appeals agreed with petitioner that the specific and mandatory terms of the charter granted him a protected property interest in continued employment in the department after his dismissal as chief of police. *Id.* 34a. "[I]f a

chief promoted from within the ranks is not removed for cause, by the plain language of the charter he must be restored to his previous position." *Id.* 36a.

2. On remand, the district court again granted respondent summary judgment. Pet. App. 15a-29a. The district court held that the premise of petitioner's claimed constitutional right – that the charter gave him a property interest in continued employment in a lower-ranked position in the police department – defeated his claim against the city. A municipality thus may be held liable under Section 1983 only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to *represent official policy*, inflicts the injury." *Monell v. Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978) (emphasis added). The district court recognized that petitioner's suit depended on establishing that the city manager had *violated* city policy by not following the requirements of the charter. Because "[t]he decision to discharge rather than reassign petitioner was a departure from the City's expressed policy, not an exercise by [the city manager] of final policymaking authority," respondent could not be held liable for the city manager's decision. Pet. App. 28a.

3. The Fifth Circuit affirmed. Pet. App. 1a-14a. The court of appeals agreed with the district court that respondent is not liable for conduct that violates the clear terms of the city charter. Because "the Charter . . . prohibits the specific action taken by [the manager]," that "action clearly does not represent final policy with respect to the removal of city

officials like [petitioner]. It is the Charter that announces the City's policy in this regard." *Id.* 13a.

The court of appeals also held that respondent was not liable because the city manager did not hold "final policymaking authority," as distinct from his more limited "final decisionmaking authority." Pet. App. 12a-13a. In the Fifth Circuit's view, although the city manager had authority to make individual employment decisions, there was no "source of law showing that the City vested [the manager] with policymaking power." *Id.* 13a.

REASONS FOR DENYING THE WRIT

The court of appeals' holding that respondent was not liable for its city manager's violation of the mandatory terms of a since-repealed provision of its Charter is clearly correct under this Court's decision in *Monell* and does not conflict with the precedents of this Court or any other court of appeals. Further review is not warranted.

1. The lower courts correctly recognized that petitioner's suit under 42 U.S.C. § 1983 is entirely self-defeating. Petitioner claims a constitutionally protected property interest in appointment to a lower-level position in the city police department based on what petitioner argued, and the court of appeals accepted, was a requirement of the city's charter. *See Bishop v. Wood*, 426 U.S. 341, 344-45 (1976) (property interest in continued public employment must be rooted in state or local law); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (same). Because petitioner's suit admittedly rests on the premise that the city manager *violated* municipal policy by not appointing him to a new position, he

cannot prevail on his claim that the manager's decision *represents* municipal policy. Respondent is accordingly not liable under *Monell v. Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978). *See* Pet. App. 13a-14a (court of appeals); *id.* 24a-28a (district court).

The irreconcilable tension within petitioner's suit is apparent from his own filings in the lower courts. Petitioner, in his first appeal, successfully urged the Fifth Circuit to recognize his property interest in continued employment on the ground that the manager "must conduct himself as prescribed in the charter" (Pet. Br. 7, No. 05-11141 (5th Cir. Filed Jan. 17, 2006)), which in turn "provides in mandatory terms that he 'shall' be restored to the rank he held prior to appointment to the position" (Pet. Reply Br. 2, No. 05-11141 (5th Cir. Filed May 6, 2006)). Subsequently, on remand in the district court, petitioner argued, *inter alia*, that (1) the city manager lacked discretion under the city charter to terminate rather than demote a chief of police who had come from the ranks and had not been discharged for cause; (2) his discharge was arbitrary and capricious because it was contrary to the Dallas city charter; (3) the city manager had ignored the plain language of the charter; and (4) the manager "did not have the discretion to simply flaunt the law." Pet. App. 27a (citations omitted).

Petitioner notes that the charter "expressly gives the City Manager sole control over both 'removal from . . . office' and 'removal from . . . employment' of any executive rank official such as the Chief of Police." Pet. 4 (quoting Dallas City Charter, ch. III, § 15). *Accord Amicus* Br. 11 (citing the same

provisions). But petitioner answers that point himself: petitioner does "*not* challenge his *removal* from the position of Chief of Police, but assert[s] that he was entitled to continued employment as a police officer, and that he therefore should have been demoted to a lower rank with the Department rather than being dismissed." Pet. 3 (emphasis added). His right to a lower-level position is determined by the city charter, which is not a question over which the city manager has any discretion, much less "sole control."

Petitioner also notes that "the court of appeals did not suggest that there was any official or agency in the city of Dallas which had the power to prevent or correct such a violation of the city charter by the City Manager." Pet. 38. But it is a commonplace feature of government that officials execute policy created by others. It therefore does not help to define the narrower class of cases in which the decision in question constitutes "official *policy*" that gives rise to municipal liability. The dispositive point is not that Dallas did not task another official with responsibility to "prevent or correct" the city manager's decision, but rather is that petitioner contends that the decision was itself contrary to an official city policy that petitioner emphatically argues was by its terms mandatory. Because petitioner's own suit rests on the assertion that respondent's policy required that petitioner be reassigned to another position in the police department, the city manager's failure to do so thus represented a departure from, not implementation of, the alleged city policy.

Petitioner also errs in his reliance on this Court's holding in *Monroe v. Pape*, 365 U.S. 167, 171 (1961), that governmental conduct is "'under color of law' under section 1983 [even] if *state* law forbids the constitutional violation in question." Pet. 39 (emphasis in original). The "color of law" inquiry determines the liability of individual government employees. The question here, by contrast, is the liability of a governmental entity – a municipality. *Monell* thus overruled *Monroe* in part by holding that Section 1983 applies to municipalities, but also held that Congress did not impose *respondeat superior* liability on municipalities, thus limiting the circumstances in which "the § 1983 remedy [is] extended to reach the deep pocket of municipalities." *Hudson v. Michigan*, 547 U.S. 586, 597 (2006). *Contra Amicus* Br. 4 (maintaining that there is a "core principle that local governments under § 1983 should be accountable for constitutional injuries inflicted by top officers," without regard to existence of official municipal policy).

In sum, petitioner cannot escape the horns of the dilemma of his own lawsuit. Petitioner's claim under Section 1983 is that respondent violated petitioner's constitutional rights because the city charter granted him a protected property interest in assignment to a lower-level position in the police department. That alleged property interest allegedly arises from the mandatory terms of the city charter. But acceptance of that assertion necessarily establishes that the city manager's failure to follow the charter amounted to a violation of city policy, for which respondent cannot be held liable. *Monell*, *supra*.

2. Petitioner errs in contending that this case implicates a circuit conflict over "whether a city is insulated from liability by the existence of a written standard forbidding violations of federal constitutional rights." Pet. 33. He maintains that "the lower courts have reached conflicting conclusions regarding cases in which the authoritative action of a city's official is inconsistent with some written standard." *Id.* 34.

The straightforward answer is that the judgment in this case does not rest on a generalized "written standard" that broadly "forbid[s] violations of federal constitutional rights." The Fifth Circuit accepted petitioner's own submission that the governing provision of the city charter required with great specificity and in mandatory terms that the city appoint petitioner to a lower-level position in the police department. The supposedly conflicting cases cited by petitioner are accordingly inapposite.

In *Lytle v. Carl*, 382 F.3d 978, 985 (9th Cir. 2004), the Ninth Circuit held that a "general statement" that a municipal official "is not authorized to violate the law, without more, cannot be enough to insulate" the municipal entity from suit. Liability was thus not precluded by a city rule broadly stating that the relevant municipal official was delegated power to take actions "not inconsistent with law." *Id.* at 984-85.

In *Martinez v. City of Opa-Locka*, 971 F.2d 708, 714 (11th Cir. 1992), the Eleventh Circuit held that a city was not protected from suit by a "precatory admonition against discrimination." The city could not avoid liability on the basis of a rule requiring that personnel decisions "be made according to merit and

fitness" (*id.*) because, beyond that vague suggestion, "the City Manager's discretion over unclassified personnel matters [was] not constrained by any policy other than set by her." *Id.* at 715.

In *Randle v. City of Aurora*, 69 F.3d 441, 450 (10th Cir. 1995), the Tenth Circuit held that constraints on employment decisions that are "*meaningful*—as opposed to merely hypothetical—" will "strip an official of 'final decisionmaking' authority." On that basis, the court of appeals remanded for further proceedings to determine "whether the Council has, in fact, enacted . . . regulations [governing employment decisions] or whether they provide a meaningful constraint on the City Officials' employment decisions." *Id.* at 449-50.

In *Angarita v. St. Louis County*, 981 F.2d 1537, 1546 (8th Cir. 1992), the Eighth Circuit held that "[a]n unconstitutional governmental policy can be inferred from a single decision taken by the highest official responsible for setting policy." The plaintiffs' suit in that case alleged that the chief of police had specifically directed that they be subject to an interrogation that involved "blatant misconduct and coercion." *Id.* No clear policy governed the terms of such an interrogation. The chief, accordingly, "had final policymaking authority," and his actions "in his official capacity in this situation [were] sufficient to impose liability on" the municipality. *Id.*

The four decisions cited by petitioner are easily distinguished, and petitioner's own Section 1983 claim would be rejected by each of the courts of appeals he cites. Like those courts, the Fifth Circuit recognized that "[i]t is well-established that a single unconstitutional action by a municipal actor may give

rise to municipal liability if that actor is a final policymaker." Pet. App. 6a. The critical distinguishing feature of this case is that petitioner's own suit is premised on the assertion that respondent had adopted a mandatory policy requiring petitioner to be assigned to a lower-level position within the police department. That policy is the *sine qua non* of the "property right" that underlies petitioner's claimed constitutional right in his suit under Section 1983. The "meaningful" provision (*Randle*) of the Dallas City Charter on which petitioner relies is different in kind from the policies involved in the decisions of other circuits he cites, which range from the "precatory" (*Martinez*) to the non-existent (*Angarita*).

3. Petitioner also errs in separately contending that review is warranted in this case to resolve a "conflict among the lower courts concern[ing] the standard for identifying the city officials for whose actions the city itself is legally responsible." Pet. 12. Petitioner focuses on a claimed disagreement among the circuits regarding whether municipal liability attaches merely to the conduct of an official with final decisionmaking authority or instead is limited to circumstances in which the official also "possesses certain additional power," such as "legislative" authority. *Id.*

Petitioner specifically claims that a conflict has existed throughout the quarter-century since the Fifth Circuit's en banc decision in *Bennett v. Slidell*, 728 F.2d 762 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985). But in that period, the Court has declined numerous opportunities to review the question he presents (beginning with *Bennett* itself),

a fact that is not immediately apparent only because petitioner omits the subsequent history of the cases he cites.

But even if a conflict otherwise worthy of this Court's attention existed, certiorari should be denied here because the competing legal rules would not affect the outcome in this case. Petitioner asserts that some courts of appeals determine municipal liability without considering whether the relevant municipal actor had the power to set policy, as opposed to the authority to implement policy set by some other municipal official (such as the mayor) or body (such as the city council). The relevant point, however, is that every circuit adheres to the requirement articulated by *Monell*, *supra*, that only "official policy" may give rise to municipal liability under Section 1983. Here, petitioner's claim rests on the assertion that the city manager acted in violation of respondent's official policy, which was set forth in the city's charter.

Put another way, even if some circuits would deem respondent's city manager to be a "final decisionmaker" for *some* purposes (for example, in exercising his discretion to fire employees other than the chief of police without reinstatement), no circuit would find municipal liability in *these* circumstances. Here, petitioner alleges that the city manager violated a mandatory rule requiring that petitioner be appointed to a lower-level position within the police department. Because the circuit conflict alleged by petitioner would not affect the disposition of this case, review is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Allen Butler
Foster Reese III
HUNTON & WILLIAMS LLP
1445 Ross Avenue, Suite 3700
Dallas, TX 75202-2799

Thomas C. Goldstein
Counsel of Record
William F. Allen
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

February 23, 2009

130

(4)

No. 08-704

Supreme Court, U.S.
FILED
MAR 6 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TERRELL BOLTON,

Petitioner,

v.

THE CITY OF DALLAS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Blvd.
Houston, TX 77008
(713) 526-5677

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
I.	There Is An Important Inter-Circuit Conflict Regarding The First Question Presented	1
II.	There Is An Important Inter-Circuit Conflict Regarding The Second Question Presented	1
III.	The Decision Below Is Not "Clearly Correct"	6
IV.	This Case Is An Appropriate Vehicle For Deciding The Questions Presented	12

TABLE OF AUTHORITIES

Page

CASES:

Angarita v. St. Louis County, 981 F.2d 1537 (8th Cir. 1992) 2, 3

Bennett v. Slidell, 472 U.S. 1016 (1985) 1

Bishop v. Wood, 426 U.S. 341 (1976) 10

Board of Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997) 12

City of St. Louis v. Prapotnik, 485 U.S. 112 (1988) 4, 11, 12

Farrar v. Hobby, 506 U.S. 103 (1992) 14

Jago v. Van Curen, 454 U.S. 14 (1981) 10

Lytle v. Carl, 382 F.3d 978 (9th Cir. 2004) 5

Martinez v. City of Opa-Locka, 971 F.2d 708 (11th Cir. 1992) 4

Monell v. Department of Social Services of City of N.Y., 436 U.S. 658 (1978) ..... *passim*

Perry v. Sindermann, 408 U.S. 593 (1972) 6, 9, 10, 12

Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995) 4

Smith v. Jackson, 544 U.S. 228 (2005) 14

Strickler v. Greene, 527 U.S. 263 (1999) 14

Wilson v. Layne, 526 U.S. 603 (1999) 14

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Brief of Defendants Appellees The City of Dallas, Texas and Teodoro Benavides, No. 05-11141 (5th Cir.).....7

I. There Is An Important Inter-Circuit Conflict Regarding The First Question Presented

The petition describes the deeply entrenched inter-circuit conflict regarding who constitutes a policymaker under *Monell v. Department of Social Services of City of N.Y.*, 436 U.S. 658 (1978). Respondent does not squarely dispute either the existence of that conflict or the importance of the issue involved. The petition describes in detail twenty-two decisions in eleven circuits, and the highest court of one state, on this recurring issue. Respondent does not question the accuracy of petitioner's account of those decisions.

Respondent notes that this Court denied certiorari when this question was first presented in *Bennett v. Slidell*, 472 U.S. 1016 (1985). (Br. Opp. 10). In 1985, however, the Court may sensibly have concluded that it would be prudent to wait to see if a serious conflict emerged once other circuits had addressed the question in *Bennett*. After almost a quarter century of extensive litigation of this issue in the lower courts, an entrenched split in the circuits has emerged, and the importance of the question at issue is beyond dispute.

II. There Is An Important Inter-Circuit Conflict Regarding The Second Question Presented

As we explain in the petition, the Eighth, Ninth, Tenth and Eleventh Circuits have held – unlike the Fifth Circuit in the instant case – that liability may

be imposed on municipalities under *Monell* despite the existence of some written municipal standard forbidding the constitutional violation in question. (Pet. 34-38). Respondent asserts that the decisions in these circuits are "easily distinguished," because the Dallas City Charter provision in the instant case "is different in kind from the policies involved in the decisions of other circuits [petitioner] cites." (Br. Opp. 10).

Respondent asserts that the Dallas Charter provision is "different in kind" from the circumstances in *Angarita v. St. Louis County*, 981 F.2d 1537 (8th Cir. 1992) because the alleged prophylactic rules relied on by the defendant in *Angarita* were "non-existent." (Br. Opp. 10).

> No clear policy governed the terms of ... an interrogation. The chief [of police] accordingly, "had final policymaking authority ... "

(Br. Opp. 9). To the contrary, the Eighth Circuit opinion in *Angarita* described a welter of quite detailed county standards.[1] The Eighth Circuit upheld

---

[1] The written rules in question concerned the procedures to be followed in investigating a claim that a city police officer had engaged in misconduct. The court summarized those written rules as follows:

> Section III of Order 85-5 states that complaints must be reduced to writing and signed by the person making the complaint and that the person initiating the complaint must have witnessed the incident or had reliable knowledge of the incident.

(Continued on following page)

the imposition of liability in *Angarita* because there was evidence there that the county (like the city in the instant case) had "departed from" its written standards, not because the court of appeals thought those standards did not exist. 981 F.2d at 1547.

Respondent asserts that the Dallas Charter provision is "different in kind" from the circumstances in

---

> Under Section V, "an accused employee will be notified in a verbal, confidential manner of the essential information of the complaint." At that time, an agreement will be effected as to the location where the accused employee can meet with a representative of the Bureau of Internal Affairs and receive a copy of the complaint. After notification, the employee's immediate supervisor will also be notified.
>
> Under Section VII, employees are permitted to have one of their supervisors present during an interview pertaining to an investigation.
>
> Further an employee's rights include the following:
>
> (1) all interviews shall be conducted while the employee is on duty;
>
> (2) only one interviewer will ask the employee questions;
>
> (3) prior to answering any questions, employees shall be informed of the allegations made against him [sic] and receive a copy of the original complaint;
>
> (4) employees shall not be subject to offensive language, nor threatened with transfer, dismissal or disciplinary action; and
>
> (5) the complete interview shall be recorded, whenever conducted by the Bureau of Internal Affairs.

981 F.2d at 1540 n.5.

Martinez v. City of Opa-Locka, 971 F.2d 708 (11th Cir. 1992), because the provision in that case was "precatory." (Br. Opp. 10). That is not correct. The Opa-Locka City Charter provision referred to by the court in *Martinez* stated that "appointments and promotions in the administrative service of the City ... *shall* be made according to merit and fitness." 971 F.2d at 714 (emphasis added). The verb "shall" in the Opa-Locka City Charter is the same verb used in the Chapter XII, section 5 of the Dallas City Charter. (Pet. App. 49a). Respondent offers no explanation, and none is readily imaginable, as to how the verb "shall" could be "mandatory" when used in the Dallas City Charter and yet "precatory" when used in the Opa-Locka City Charter. (Br. Opp. 10). The Eleventh Circuit in *Martinez* itself never characterized the city standard in that case as "precatory." To the contrary, the word "precatory" appears in the Eleventh Circuit opinion only in a quotation from this Court's opinion in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). *Martinez*, 971 F.2d at 714 (quoting *Praprotnik*, 485 U.S. at 130).

In *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the Tenth Circuit held that to provide a defense to a *Monell* action a written municipal standard must impose "a meaningful constraint on the City Officials' employment decisions." 69 F.3d at 449-50. Respondent insists that the relevant section of the Dallas City Charter is a "'meaningful' provision" (Br. Opp. 10), and thus is "different in kind" from a provision that does not – as the Tenth Circuit requires – impose a "meaningful restraint." (*Id.*) But respondent

asserts only that the Dallas Charter contains a "'meaningful' provision," not that the Charter imposes a "meaningful restraint." The difference is significant, and goes to the heart of the second question presented.

A document or action can be "meaningful" without imposing a "meaningful constraint." If, during Watergate, the House and Senate had adopted a joint resolution urging President Nixon not to resign, that would have been a meaningful resolution (indicating, for example, that he was unlikely to be impeached), but not a meaningful constraint, because Nixon would have remained completely at liberty to quit. When, as in the instant case, a city charter calls on a city official to act in a particular way, but provides absolutely no method of review or redress if the official in question violates that standard, there is no meaningful *constraint*.

Respondent asserts that the Dallas provision at issue in the instant case is "different in kind" from the provision the Ninth Circuit found insufficient to insulate the school board from liability in *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004). Respondent does not, however, explain what that difference might be. Respondent does describe the provision in *Lytle* as "general," while insisting that Chapter XII, section 5 of the Dallas Charter is not "generalized." (Br. Opp. 8). Perhaps respondent intends to suggest that the Dallas provision is "different in kind" from the provision in *Lytle* because the Dallas provision is more specific. Such a theory might distinguish a city

charter requiring officials to "obey the Constitution of the United States" (which might be too general to bar a *Monell* claim) from a city charter directing officials to "obey the Due Process Clause of Section One of the Fourteenth Amendment" (which could be sufficiently specific to bar such a claim). But why under *Monell* such a dissimilarity in scope would constitute a "differ[ence] in kind" – with such dramatically different legal consequences – is difficult to understand.

III. The Decision Below Is Not "Clearly Correct"

The Fifth Circuit held that

> Chapter XII, § 5 of the Charter ... prohibits the specific action taken by [the City Manager]. It is the Charter that announces the City's policy in this regard.

(Pet. App. 13a). Respondent contends that the court of appeals was "clearly correct" to reject petitioner's claim, but conspicuously does not endorse the reasoning of that court. Respondent's insistence on defending the decision below on other grounds is rooted in the history of this litigation.

Petitioner's Due Process claim necessarily rests on a showing that he had a constitutionally protected property interest in employment in the position in the police department from which he had been promoted to Chief. See *Perry v. Sindermann*, 408 U.S. 593 (1972). Petitioner's complaint alleged that Chapter XII, section 5 of the City Charter, by requiring the

city to return him to that earlier position once he was removed as Chief, created just such a property interest.

From the outset of the litigation, however, the city has disputed petitioner's interpretation of Chapter XII, section 5, insisting that it created no property interest in employment because the provision permitted the City Manager to fire petitioner. The city argued that "[b]ecause Section 5 imposes no limitation on the City's right to terminate, it does not grant a property interest in continued employment."[2] The language of section 5, the city maintained, was "too nebulous" to confer such a property interest;[3] thus "Section 5 ... necessarily left untouched [the City Manager's] discretion in ... removing executive level employees."[4]

In 2005 the district court granted summary judgment on this ground. (Pet. App. 42a-44a). On appeal, however, the Fifth Circuit in 2006 rejected the city's interpretation of section 5, and held that the City Charter does (except in certain circumstances) forbid the dismissal of a Chief who previously served as a police officer. (Pet. App. 33a-36a).

The city subsequently sought summary judgment under *Monell*. The most recent 2008 decision of the

---

[2] Brief of Defendants Appellees The City of Dallas, Texas and Teodoro Benavides, No. 05-11141 (5th Cir.) at 7.

[3] *Id.* at 8.

[4] *Id.* at 14.

court of appeals, in approving dismissal of petitioner's claim, expressly relied on an interpretation of Chapter XII, section 5 – that it "prohibits the specific action taken by [the city manager]" – that is precisely the opposite of the city's own longstanding construction of that provision. (Pet. App. 13a). Thus when the court of appeals stated that "the Charter ... announces the City's policy" (Pet. App. 13a), it was reading into the Charter a policy which the city throughout this litigation has insisted the Charter does not contain. Under these circumstances it is understandable that the respondent does not defend or rely on the reasoning of the court of appeals below.

The Brief in Opposition is worded with considerable care to avoid asserting – contrary to the city's longstanding position – that the language of (or any policy in) Chapter XII, section 5 protected petitioner from dismissal. With studied consistency the Brief in Opposition always refers to any such prohibition, not as the actual meaning of Chapter XII, section 5, but only as the meaning "assert[ed]," "allege[d]," "contend[ed for]" or "claim[ed]" by petitioner, or found by the Fifth Circuit.[5] Whenever the Brief in Opposition uses the adjective "mandatory" with regard to Chapter XII, section 5, it carefully does so only in describing the interpretation of that provision advanced by

---

[5] E.g., Br. Opp. 1 ("[p]etitioner alleges that the city manager was required to appoint petitioner to a particular job under ... the city's charter"); see *id.* at 1, 6, 7, 10, 11.

petitioner.[6] The Brief in Opposition never itself describes Chapter XII, section 5, as "clear," "express," or "highly specific"; rather, respondent invariably attributes those characterizations to either petitioner or the Fifth Circuit.[7] Above all, the Brief in Opposition – unlike the decision of the court of appeals – never describes Chapter XII, section 5 as embodying any municipal policy which forbids dismissal of a Police Chief in petitioner's position.[8]

Rather than rely on reasoning of the Fifth Circuit, respondent instead argues that – regardless of meaning of the City Charter – petitioner's claim is inherently "self-defeating." (Br. Opp. 1, 4). If petitioner succeeds in showing, as *Perry* requires, that he had a property interest in continued employment, respondent asserts that that would ipso facto demonstrate that the city had a policy that forbade dismissal of the plaintiff. Thus here – and perhaps in every *Perry* claim against a city – the very showing

---

[6] Br. Opp. 1, 2, 4, 8, 10, 11.

[7] Br. Opp. 2 ("Petitioner's constitutional claim rests on the assertion that the clear and mandatory terms of the city charter give him a constitutionally protected property interest"); see *id.* at 1, 2, 8.

[8] E.g., Br. Opp. 1 ("petitioner's assertion that the city violated the 'official policy' ... in the city charter")(emphasis omitted).

required by *Perry* would by its nature bar municipal liability under *Monell*.[9]

This syllogism assumes that the standard for establishing a property interest under *Perry* is the same as the standard for establishing a policy under *Monell*. But those legal standards are clearly different. Under *Perry*, for example, a property interest could be created by a simple contract, an "implied contract," or even an "understanding." 408 U.S. at 601; *Jago v. Van Curen*, 454 U.S. 14, 18 (1981); *Bishop v. Wood*, 426 U.S. 341, 344 (1976). But many if not most informal understandings, implied contracts, and even express contracts involving city officials would not constitute policies within the meaning of *Monell*.

In the instant case there are two important distinctions between the *Perry* and *Monell* standards. First, respondent assumes that there can be only a single policy in any given city; thus if Chapter XII, section 5 constitutes a city policy, respondent reasons, nothing done by any Dallas official that is inconsistent with that provision could itself constitute a municipal policy. On respondent's theory, even if the Mayor and City Council of Dallas had enacted an ordinance that dismissed petitioner, that ordinance

---

[9] Br. Opp. 7 ("Petitioner's ... alleged property interest allegedly arises from the mandatory terms of the city charter. But acceptance of that assertion necessarily establishes that the city manager's failure to follow the charter amounted to a violation of city policy.")

itself would have been, not a city policy, but a violation of municipal policy.

The *Praprotnik* plurality opinion, however, expressly recognized that there will be situations in which a city indeed has *two* policymakers, and in which as a result there are two (possibly inconsistent) actions or standards, both of which would constitute a "policy" for which a city would be held liable under *Monell*.

> Assuming that applicable law does not make the decisions of the [Civil Service] Commission reviewable by the Mayor and Aldermen, or vice versa, one would have to conclude that policy decisions made by *either* the Mayor and Aldermen *or* by the Commission would be attributable to the city itself.

485 U.S. at 126 (emphasis added). Thus under the governmental structure in St. Louis, if the city's Civil Service Commission adopted a rule forbidding dismissal of the Chief of Police except for cause, but the Mayor and Aldermen nonetheless fired the chief for some impermissible reason, both the Commission's rule and the action of the Mayor and Aldermen would constitute policies under *Monell*. The St. Louis Police Chief would have a constitutionally protected property interest (because of the Civil Service Commission's rule), but the city would be liable for the dismissal (because of the action of the Mayor and Aldermen).

The circumstances of the instant case fall squarely within the Court's analysis in *Praprotnik*. The actions of the voters, in adopting the Dallas City Charter, were not "reviewable by" the City Manager. The actions of the City Manager, in firing Chief Bolton, were not "reviewable by" the electorate. Thus both actions constituted municipal policy under *Monell*.

Second, under *Perry* a court could construe some municipal provision or action to establish a property interest, even though (as here) city officials adamantly disagreed. It is entirely unimportant under *Perry* whether city officials dispute the court's interpretation of such a provision. But under *Monell* it makes little sense to describe as the "official policy" of a city a *federal* court's interpretation of an ordinance or charter provision with which city officials emphatically disagree. Surely the three federal judges who in 2006 construed the Dallas City Charter to protect petitioner from dismissal cannot themselves be characterized as "officials whose acts may fairly be said to be those of the municipality." *Board of Commissioners of Bryan County v. Brown*, 520 U.S. 397, 403-04 (1997).

IV. This Case Is An Appropriate Vehicle For Deciding The Questions Presented

The case presents in particularly stark terms both of the questions presented. With regard to the first question, the court of appeals held that the

highest ranking administrative official in Dallas, who oversees thousands of city employees and a multi-billion dollar budget, did not act on behalf of the city when he fired the city's Chief of Police. With regard to the second question, the court of appeals declared to be the "official policy" of the city – precluding liability for any other action – an interpretation of the City Charter which city officials have long adamantly rejected and which the City Manager was empowered to disregard with impunity.

Respondent asserts that it will "clearly" prevail on the second question presented, and that the case thus does not provide an appropriate vehicle for deciding the first question. As we explain above, the merits of respondent's arguments on the second question are, if anything, weaker than its position on the first question.

When a petition presents two or more questions, moreover, the Court is not required at the certiorari stage to attempt to predict the strength of the arguments on each question. Such a practice is not necessary to assure that at the merits stage the Court will be able to reach and resolve the questions which certiorari was granted to resolve. Even if the Court ultimately decides one question in favor of the respondent, the Court neither must nor invariably does limit its opinion to that particular question. To the contrary, the Court often affirms a decision despite having addressed and resolved one or more issues in favor of the petitioner. In such cases the Court first

discusses the matters on which the petitioner prevails, and then considers the issues on which the respondent prevails and that result in an affirmance. E.g., *Smith v. Jackson*, 544 U.S. 228 (2005); *Strickler v. Greene*, 527 U.S. 263 (1999); *Wilson v. Layne*, 526 U.S. 603 (1999); *Farrar v. Hobby*, 506 U.S. 103 (1992).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Blvd.
Houston, TX 77008
(713) 526-5677

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record*

Counsel for Petitioner

117 (2) No. 08-704

Supreme Court, U.S.
FILED
JAN 22 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRELL BOLTON,

Petitioner,

v.

THE CITY OF DALLAS, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

STEFANO G. MOSCATO
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

MICHAEL D. SIMPSON
Assistant General Counsel
National Education Association
Office of General Counsel
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

PAUL W. MOLLICA
Counsel of Record
MEITES, MULDER,
MOLLICA & GLINK
20 S. Clark Street
Suite 1500
Chicago, IL 60603
(312) 263-0272

Counsel for Amici Curiae

610899

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT OF *AMICI CURIAE*	3
ARGUMENT	4
I. The Case Law of the Fifth and Seventh Circuits Imposes Arbitrary, Extra-Statutory Limits to Proving Causation Under *Monell*	4
II. The Case Law of the Fifth and Seventh Circuits Deflects Public Accountability for Constitutional Violations, Contrary to *Monell*	11
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Page

Cases

Amnesty America v. Town of West Hartford, 361 F.3d 113 (2d Cir. 2004) 10

Auriemma v. Rice, 957 F.2d 397 (7th Cir. 1992) 3, 9

Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397 (1997) 7

Bowsher v. Synar, 478 U.S. 714 (1986) 8

CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008) 2

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 6

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 8

Engquist v. Oregon Dept. of Agr., 128 S. Ct. 2146 (2008) 2, 4, 8, 14

Garcetti v. Ceballos, 547 U.S. 410 (2006) 4

Gilbert v. Homar, 520 U.S. 924 (1997) 4

Cited Authorities

	Page
Jett v. Dallas Independent School Dist., 7 F.3d 1241 (5th Cir. 1993)	3
Jett v. Dallas Ind. Sch. Dist., 491 U.S. 701 (1989)	9
Kentucky River Retirement Systems v. EEOC, 128 S. Ct. 2361 (2008)	2
Lytle v. Carl, 382 F.3d 978 (9th Cir. 2004)	11
Martinez v. City of Opa-Locka, 971 F.2d 708 (11th Cir. 1992)	13
McMillian v. Monroe County, Ala., 520 U.S. 781 (1997)	9
Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395 (2008)	2
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)	9
Meyers v. City of Cincinnati, 14 F.3d 1115 (6th Cir. 1994)	12
Mitchum v. Foster, 407 U.S. 225 (1972)	7
Monell v. Department of Social Services of City of N.Y., 436 U.S. 658 (1978)	*passim*

Cited Authorities

	Page
Monroe v. Pape, 365 U.S. 167 (1961)	6, 12
Morrison v. Olson, 487 U.S. 654 (1988)	8
Owen v. City of Independence, Mo., 445 U.S. 622 (1980)	13
Pearson v. Callahan, No. 07-751 (U.S. S. Ct. Jan. 21, 2009)	5
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)	4, 6, 7, 11
Rankin v. McPherson, 483 U.S. 378 (1987)	8
Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995)	13
Simmons v. Uintah Health Care Special Dist., 506 F.3d 1281 (10th Cir. 2007)	10
Snyder v. Massachusetts, 291 U.S. 97 (1934)	7
Sprint/United Management Co. v. Mendelsohn, 128 S. Ct. 1140 (2008)	2

Cited Authorities

Page

Statutes

42 U.S.C § 1983 ..... *passim*

Other

Charles Dickens, *Little Dorrit*, ch. 10 (1857) ... 11

U.S. Census Bureau, Annual Estimates of the Population for Incorporated Places over 100,000, July 1, 2007, http://www.census.gov/popest/cities/SUB-EST2007.html 3

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The **National Employment Lawyers Association (NELA)** is the only professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who represent employees who have suffered from employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. Many NELA lawyers represent city and county employees seeking relief from constitutional violations in the workplace. NELA is thus well positioned as an organization to explain the significance of the issues at bar to litigating such claims.

The questions presented by Petitioner are important to the development of law in the area. In spite of *Monell v. Department of Social Services of City of N.Y.*, 436 U.S. 658 (1978), some circuits continue to allow local governments to avoid civil liability for

---

[1] The parties have consented to the filing of this brief, and their written consent is on file with the Clerk. No counsel for any party to this action authored this brief in whole or in part. Furthermore, the *amici* and their undersigned counsel bore the full cost of preparation and submission of this brief, and no other person or entity made any monetary contribution to the preparation or submission of this brief. Supreme Court Rule 37.6.

constitutional violations against their employees. Plaintiffs are denied a fair chance to try their claims because – in those circuits – municipalities disclaim accountability for decisions made even in the highest reaches of leadership. This brief *amici curiae* explains why this case presents a good opportunity for redirection.

NELA has filed numerous *amicus curiae* briefs before this Court and the federal courts of appeals to ensure that the civil rights of employees are fully realized. Some of the more recent cases before the U.S. Supreme Court in which NELA has recently filed *amicus curiae* briefs include *Crawford v. Metropolitan Gov't of Nashville & Davidson Co.* (No. 06-1595); *Gross v. FBL Financial Serv's, Inc.* (No. 08-441); *Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146 (2008); *Sprint/ United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008); *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Kentucky River Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008); *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008).

The **National Education Association (NEA)** is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to protecting the constitutional rights of public school employees and, to this end, frequently files *amicus curiae* briefs before this Court.

SUMMARY OF THE ARGUMENT OF *AMICI CURIAE*

Within the geographical borders of the Fifth and Seventh Circuits lie seven of the twenty most populous cities in the United States: Chicago, Houston, San Antonio, Dallas, Indianapolis, Austin, Fort Worth. U.S. Census Bureau, Annual Estimates of the Population for Incorporated Places over 100,000, July 1, 2007, http://www.census.gov/popest/cities/SUB-EST2007.html. These cities (and many other units of local government), under the prevailing law of these two circuits, may insulate themselves from unwanted constitutional litigation, by the expedient of (1) vesting final decisionmaking authority in "executive" figures, such as mayors or city managers; or (2) passing an ordinance that ostensibly "bans" officers from violating the constitution. *See, e.g., Auriemma v. Rice*, 957 F.2d 397, 399-400 (7th Cir. 1992); *Jett v. Dallas Independent School Dist.*, 7 F.3d 1241, 1248-50 (5th Cir. 1993).

This case exemplifies the harsh results of this errant case law. The district court "assume[d] *arguendo* that Bolton's Fourteenth Amendment [Due Process] rights were violated when [City Manager] Benavides decided to terminate, rather than reassign, him. . . ." (App. 24a). Even in the teeth of this possibility, the Fifth Circuit held that no liability attached to the city because "the city manager's . . . position is executive rather than legislative" (App. 11a). Alternatively, the panel held that an ordinance which supposedly "prohibit[ed] the specific action taken by Benavides" (App. 13a) insulated the city from civil liability.

Both holdings exalt formalities over the core principle that local governments under § 1983 should be accountable for constitutional injuries inflicted by top officers. *Monell v. Dep't of Social Services of City of N.Y.*, 436 U.S. 658, 692 (1978). It has been lost on these circuits that "*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). The Court should grant *certiorari* and close off the wrong path that these courts have taken.

ARGUMENT

I. The Case Law of the Fifth and Seventh Circuits Imposes Arbitrary, Extra-Statutory Limits to Proving Causation Under *Monell*

This Court has often concerned itself with the constitutional rights possessed by public employees. As recently as last term, this Court reaffirmed that public employees enjoy rights against illegal classification under the Equal Protection Clause. *See, e.g., Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146, 2155 (2008) ("our cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently"). Public employees hold First Amendment rights against retaliation for their public speech. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (*citing Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 572 (1968)). And, as implicated in this case, public employees can have Due Process rights against wrongful termination. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997) ("public employees

who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process") (*citing Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972), *and Perry v. Sindermann*, 408 U.S. 593, 602-603 (1972)).

And yet those municipal employees who reside in the Fifth and Seventh Circuits may come to grief when they seek to enforce those rights in federal court. They find themselves pincered between the defense of qualified immunity – which excuses individual officials from liability when their conduct does not violate clearly-established constitutional standards, *see Pearson v. Callahan*, No. 07-751 at 5-6 (U.S. S. Ct. Jan. 21, 2009) – and case law that insulates local governments from liability for the final decisions of top executive officials. So here, in the first interlocutory appeal of this case, Petitioner Bolton lost the qualified immunity defense against the City Manager who fired him, because it was not settled law at the time of his termination that the city charter invested the officeholder with a property interest (App. 38a) ("[a]lthough we now conclude that § 5 of the Dallas City Charter creates a vested property right in employment at a former rank for executive-level officials, this decision is not apparent from *Muncy* [*v. City of Dallas*, 335 F.3d 394, 398 (5th Cir. 2003)]"). In the second round, the Fifth Circuit held that the city was not liable because the City Manager was not a final policymaker (App. 12a).

These courts apply a standard of causation that runs against the grain of *Monell*, which was intended to broaden municipal liability. The Court in *Monell*, when

it overruled the absolute immunity previously enjoyed by local governments in *Monroe v. Pape*, 365 U.S. 167 (1961), reaffirmed the principle "that vicarious liability would be incompatible with the causation requirement set out on the face of § 1983." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988). Accordingly, it held that a local government could be liable when its "official policy" was the "moving force" behind a breach. *Monell*, 436 U.S. at 694 ("it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983"). The decision incontestably broadened the opportunities for citizens to hold local government accountable, although it still required some showing of causation by the plaintiff.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 471 (1986), this Court considered "whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement." It held "that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur*, 475 U.S. at 480. The majority reasoned that:

> where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983. [*Id.* at 481.]

Yet the Court failed to reach a majority in support of a more precise definition. A four-justice plurality held that "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 481. As the Petitioner describes fully in his papers, the circuits have reached widely divergent opinions about the reach of this standard.

There is notorious instability in the causation principle first hatched in *Monell. See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 430-37 (1997) (Breyer, J., dissenting with Stevens and Ginsburg, JJ.) (calling for reexamination of the *Monell* causation framework); *id.* at 429-30 (Souter, J., dissenting with Stevens and Breyer, JJ.) (same). But we can be certain of one thing: that whatever the right standard *ought* to be, the Fifth Circuit's position – drawing a line between "executive" decision-makers and "legislative" policy-makers – *cannot* be the correct one. It is a classic "tyranny of labels," *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (Cardozo, J.), holding relief hostage to a federal court's *post hoc* determination about whether a local official's decision ought to be considered "legislative" or "executive" in nature.

Nothing in the language of § 1983, or the nature of the rights themselves, warrants the false subdivision of "legislative" and "executive" authority. Section 1983 furnishes a cause of action to correct constitutional violations, regardless of the source. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("[t]he very purpose of § 1983 was to interpose the federal courts between the States

and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial") (citation and internal quotation marks omitted). Equal Protection covers actions by executive and legislative officials alike. *Engquist v. Oregon Dept. of Agr.*, 128 S. Ct. 2146, 2150 (2008) ("[i]t is well settled that the Equal Protection . . . Clause's protections apply to administrative as well as legislative acts"). Executive officers, no less than legislators, are barred by the First Amendment against retaliating against employees on account of public speech. *Rankin v. McPherson*, 483 U.S. 378, 380 (1987) (defendant in First Amendment retaliation case identified as a "Constable . . . an elected official who functions as a law enforcement officer"). And the Due Process Clause constrains arbitrary actions by each branch of government. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

The Court itself has noted the challenge of drawing lines between branches, even under the Federal Constitution. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988) (noting the "difficulty of defining such categories of 'executive' or 'quasi-legislative'"); *Bowsher v. Synar*, 478 U.S. 714, 748 (1986) (Stevens, J., joined by Marshall, J., concurring in the judgment) (observing "unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power"). Yet the Fifth and Seventh Circuits compound the folly by attempting to impress legislative/executive

classifications upon units of local government, a form of interference that this Court once disapproved.

> while it might be easier to decide cases arising under §1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish

McMillian v. Monroe County, Ala., 520 U.S. 781, 795 (1997).

Even more lamentably, these circuits sanction a second rule: that so long as a local government adopts a written policy prohibiting its officers from violating constitutional norms, it cannot – as a matter of law – be held liable for their officers' breaches. *See* App. 13a ("[i]t is the Charter that announces the City's policy in this regard"); *Auriemma*, 957 F.2d at 401 ("[t]he Superintendent of Police in Chicago had no power to countermand the statutes regulating the operation of the department"). The Court previously rejected such an argument, tendered in the context of Title VII, holding that the existence of an anti-discrimination policy alone did not insulate the employer from liability for a supervisor's sex harassment of an employee. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability"). *Cf. Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 737-38 (1989) (remanding for finding of whether school

district could be liable for superintendent's actions, where district had a written policy prohibiting the actions alleged).

Other courts of appeals have held that such a rule would be a pathway to subverting *Monell* altogether. As the Tenth Circuit observes, even an executive's defiance of written policy should not fend off governmental liability:

> This must include even actions by final policymakers taken in defiance of a policy or custom that they themselves adopted. Were the rule of law different, we would invite irrational results. Holding municipalities immune from liability whenever their final policymakers disregard their own written policies would serve to encourage city leaders to flout such rules. Policymakers, like the members of the Board before us, would have little reason to abide by their own mandates, like the RIF policy, and indeed an incentive to adopt and then proceed deliberately to ignore them. Such a rule of law would thus serve to undermine rather than enhance Section 1983's purposes.

Simmons v. Uintah Health Care Special Dist., 506 F.3d 1281, 1285 (10th Cir. 2007) (footnote omitted). Other circuits agree. *See, e.g., Amnesty America v. Town of West Hartford*, 361 F.3d 113, 127 n.7 (2d Cir. 2004) (municipality may be liable for deliberate indifference of police chief to use of excessive force at demonstration, in spite of "Town's written policy on the use of force in

arrests, and its written policy on handling anti-abortion protests"); *Lytle v. Carl*, 382 F.3d 978, 985 (9th Cir. 2004) ("[a] general statement by a school board or board of trustees that a superintendent is not authorized to violate the law, without more, cannot be enough to insulate the school district from liability").

II. The Case Law of the Fifth and Seventh Circuits Deflects Public Accountability for Constitutional Violations, Contrary to *Monell*

Monell, as noted, "is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). The responsibility problem is poignant in this case, because the City Manager exercised plenary authority over both "removal from . . . office" and "removal from . . . employment" of any executive rank official such as the Chief of Police. (Dallas City Charter, ch. III, § 15) (App. 25a, 48a). No one, save for the City Manager himself, could have put out the lights in Bolton's office – his decision was both final and unreviewable. While the charter section appears crafted to shield the City Manager from political influence in making key appointments, by the Fifth Circuit's lights it also paradoxically allows everyone in the process to avoid accountability for removing Bolton from public service, without cause. *E.g.*, Charles Dickens, *Little Dorrit*, ch. 10, "Containing the whole Science of Government" (1857) ("[b]ecause the Circumlocution Office was down upon any ill-advised public servant who was going to do it, or who appeared to be by any surprising accident in remote danger of doing it, with a minute, and a memorandum, and a letter of instructions that extinguished him"). This heralds a return to the era of

Monroe v. Pape: immunity for local units of government, as decreed in a self-serving ordinance.

Compare the outcome here to a Sixth Circuit decision in favor of the plaintiff on comparable facts, *Meyers v. City of Cincinnati*, 14 F.3d 1115 (6th Cir. 1994). The court there held that the single act by the City's Director of Safety and City Manager of discharging a fire chief in retaliation for exercising his First Amendment rights was an exercise of civic authority that warranted corporate liability. The panel majority specifically disaffirmed the suggestion that the termination must be rooted in official express policy:

> The City argues that it is not liable under *Monell* because Meyers was not discharged pursuant to a formal city "policy." The City states, as though it is dispositive, that "[t]here is no evidence of any policy or custom of disciplining municipal employees for exercising their right of free speech. There is no evidence that any final policy-making official ever promulgated a policy of disciplining City employees for exercising their rights of free speech." Petitioner's Brief at 17. *No municipal official in his right mind would advocate such a general policy.* The City is not accused of routinely disciplining employees for exercising First Amendment rights or of having an officially promulgated policy to that effect. Its highest officials-the Safety Director, the City Manager and the Civil Service Commission-acted together to

> discipline John Meyers for exercising his constitutional rights in this one case. [*Id.* at 1117, emphasis added.]

Indeed, Cinncinati (like Dallas) assigned to its City Manager solitary authority to "dismiss, suspend and discipline all officers and employees in the administrative service under the control of the City Manager." (*id.* at 1118, *quoting* Administrative Code of the City of Cincinnati, Art. II, § 1). Such solitary executive authority by city managers to hire and fire recurs in § 1983 case law. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 625 n.2 (1980) ("[u]nder §3.3(1) of the city's charter, the City Manager has sole authority to '[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments and all other administrative officers and employees of the city. . . .'"); *Randle v. City of Aurora*, 69 F.3d 441, 448-49 (10th Cir. 1995) (finding genuine issue of material fact about whether City Manager was final policymaker under ordinance that conferred power to "[a]ppoint, suspend, transfer and removal of all employees of the city, except as otherwise provided herein, subject to the personnel regulations of the city adopted by the council"); *Martinez v. City of Opa-Locka*, 971 F.2d 708, 715 (11th Cir. 1992) (per curiam) (finding monetary damages award against municipality was appropriate where the City Manager, who had final policymaking authority with respect to personnel decisions, terminated a city employee for exercising her First Amendment rights to criticize the City Manager).

Because the outlier decisions of the Fifth and Seventh Circuits allow local government to avoid accountability for constitutional violations, purely by moving authority around on paper, the *amici curiae* ask that this Court take up the present case and reverse the decision below.

* * * *

Two final points make this case highly suitable for review. First, not only was the decision below erroneous, but the panel below expressly cited – and rejected – the case law of other circuits authorizing municipality liability for the decisions of officers endowed with final or supervisory power or authority (App. 9a-10a). Application of the rule also truly made a difference in the outcome. The panel made no assessment on the merits about whether the City Manager's decision violated Bolton's Due Process rights, and it even assumed *arguendo* that Bolton's rights were violated by his termination (App. 24a).

Second, the Court may review this case without fear of unbalancing the relationship between local governments and their employees. This Court recently held that "in striking the appropriate [constitutional] balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist*, 128 S. Ct. at 2152. Yet the core constitutional rights at stake – Equal Protection, Due Process, and the First Amendment – are beyond doubt. The only issue presented by this case

is whether employees will enjoy a fair opportunity to enforce them in federal courts. Because the Fifth and Seventh Circuits have placed slippery barriers around *Monell*, out of keeping with this Court's precedents, the language of § 1983, or common sense, we urge that the Court grant review of the decision below and reverse it.

CONCLUSION

For the above reasons, *amici curiae* NELA and NEA respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

STEFANO G. MOSCATO
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

PAUL W. MOLLICA
Counsel of Record
MEITES, MULDER,
MOLLICA & GLINK
20 S. Clark Street
Suite 1500
Chicago, IL 60603
(312) 263-0272

MICHAEL D. SIMPSON
Assistant General Counsel
National Education Association
Office of General Counsel
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

Counsel for Amici Curiae

128

(5)

No. 08-704

FILED
APR 24 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

TERRELL BOLTON,

Petitioner

v.

THE CITY OF DALLAS, TEXAS,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING CERTIFICATION

Terrell Bolton, Petitioner, *Pro Se*
5141 Whispering Oaks Drive
Dallas, Texas 75236
(972) 780-0191

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

Terrell, Bolton, the petitioner appearing Pro Se, hereby moves this Court to exercise his rights under Rule 44.2 of the United States Rules of Procedures of the Supreme Court to resubmit to the full Supreme Court petitioner's Petition for a Writ of Certiorari (Case No. 08-704) together with all the subsequent filings and *Amici Curiae* briefs in this case by Petitioner versus the City of Dallas, Texas, for Rehearing.

The questions presented in the original brief are further clarified to state the underlying constitutional law issues in this case that need to be addressed and reconciled by the Supreme Court because the outlier decision of the Fifth Circuit allows local government to avoid accountability for constitutional violations. The Fifth Circuit also ruled, as part of this same action, that the discharging official cannot be held liable "personably" for violation of the petitioner's constitutional rights. There should be no instance or circumstance where a citizen's constitutional rights are violated and there is no accountability by any party or entity for the violation. For this reason, the petitioner respectfully requests that the Court should take up the present case and reverse the decision of the Court of Appeals.

Petitioner is submitting this Motion for Rehearing of the Petition for a Writ of Certiorari to this Court for consideration. The Petitioner's Petition for a Writ of Certiorari was originally denied by order of the Court on March 30, 2009, without comment. This case presents questions of broad practical importance to the administration of the Fourteenth Amendment of the Constitution of the United States.

The "deeply divided" decisions of this Court, concerning the issues outlined in the original petition for this case, needs reconciliation because of the resulting conflict and lack of uniformity among the lower courts decisions has caused some individuals whose constitutional rights under the fourteenth amendment remedy and others, such as myself no remedy, creating serious inequities in the application of constitutional law.

The questions of whether an official can be held liable for a constitutional violation "whose edicts or acts may fairly be said to represent official policy" is an important and recurring question of Federal Law on which uniformity is important. There can be no question that the issue presented in this case is recurrent. The cases cited in the original petition and in this petition are only a fraction of the recent cases presenting this issue in the federal courts. The importance of the issue is equally clear. The Court of Appeals for the Fifth Circuit did not require a finding or proof that the petitioner's rights under the Fourteenth Amendment were violated. The Court of Appeals Panel also made no assessment on the merits about whether the City Manager's decision violated petitioner's due process rights.

Additionally, in an egregious violation of established procedures and of petitioner's jury trial rights, the court of appeals rejected petitioner's challenge to a crucial element of liability by municipal officials that this court has held that an official can be held liable for a constitutional violation "whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694, *Monell v. Department of Social Services of City of N.Y.*, 436 U.S. 658 (1978).

As stated in the original brief filed with the Court and that is supported by the *Amici Curiae* Brief filed by the National Employment Lawyers Association (NELA), the conflict regarding this question is well recognized. The Seventh Circuit commented in *Auriemma* that "decisions of the other courts of appeals on this subject are so varying that there is little point in canvassing them." 957 F. 2d at 400. The Supreme Court of Wisconsin observed that the federal cases have taken several approaches to this issue. Some cases equate policymaking with legislative power, others with executive power. *Burkes v. Klauser*, 185 Wis. 2d 308, 353, 517 N.W. 2d 503, 522 (1994). In *Small v. Inhabitants of City of Belfast*, 796 F. 2d 544 (1st Cir. 1986), the court of appeals noted that the Fifth Circuit's en banc decision in *Bennett v. City of Slidell*, 728 F. 2d 762 (5th Cir. 1984), had rejected the majority rule that a city is liable for the final, unreviewable employment action of a city official. 796 F. 2d at 552-53. The First Circuit, however, expressly refused to follow the decision in *Bennett*, holding that the majority rule was "more persuasive." 796 F. 2d at 553.

This Court's review is warranted to resolve the Circuit conflict and to forestall further distortion of the Constitution and uniform legal precedents in this matter that will evitable affect many other similarly situated public employees who have guaranteed equal protections under the Fourteenth Amendment.

The Court -- especially prior to the expiration of a Current Term -- has in the past reconsidered and granted review on previously denied Petitions for Certiorari for compelling circumstances.

Petitioner's discharge by the City of Dallas was both unconstitutional and in violation of Supreme Court precedents. It was also in conflict with several other lower court decisions in similar cases with the differing interpretations of legal precedents that "gives [some] employees an unfair advantage over other employees, and has unlawfully resulted in inequality for some persons (such as myself) as it relates to fourteenth amendment violations.

Petitioner Terrell Bolton respectfully prays that this Court grant rehearing for writ of certiorari originally filed in this case to review the judgment and opinion of the Court of Appeals entered on August 7, 2008.

Petitioner has attached to and makes a part of this Motion of April 24, 2009, PETITION FOR REHEARING AND CERTIFICATION the required Certificate of Service and Certificate of Word Count Compliance.

Terrell Bolton, Petitioner, *Pro Se*
5141 Whispering Oaks Drive
Dallas, Texas 75236
(972)780-0191